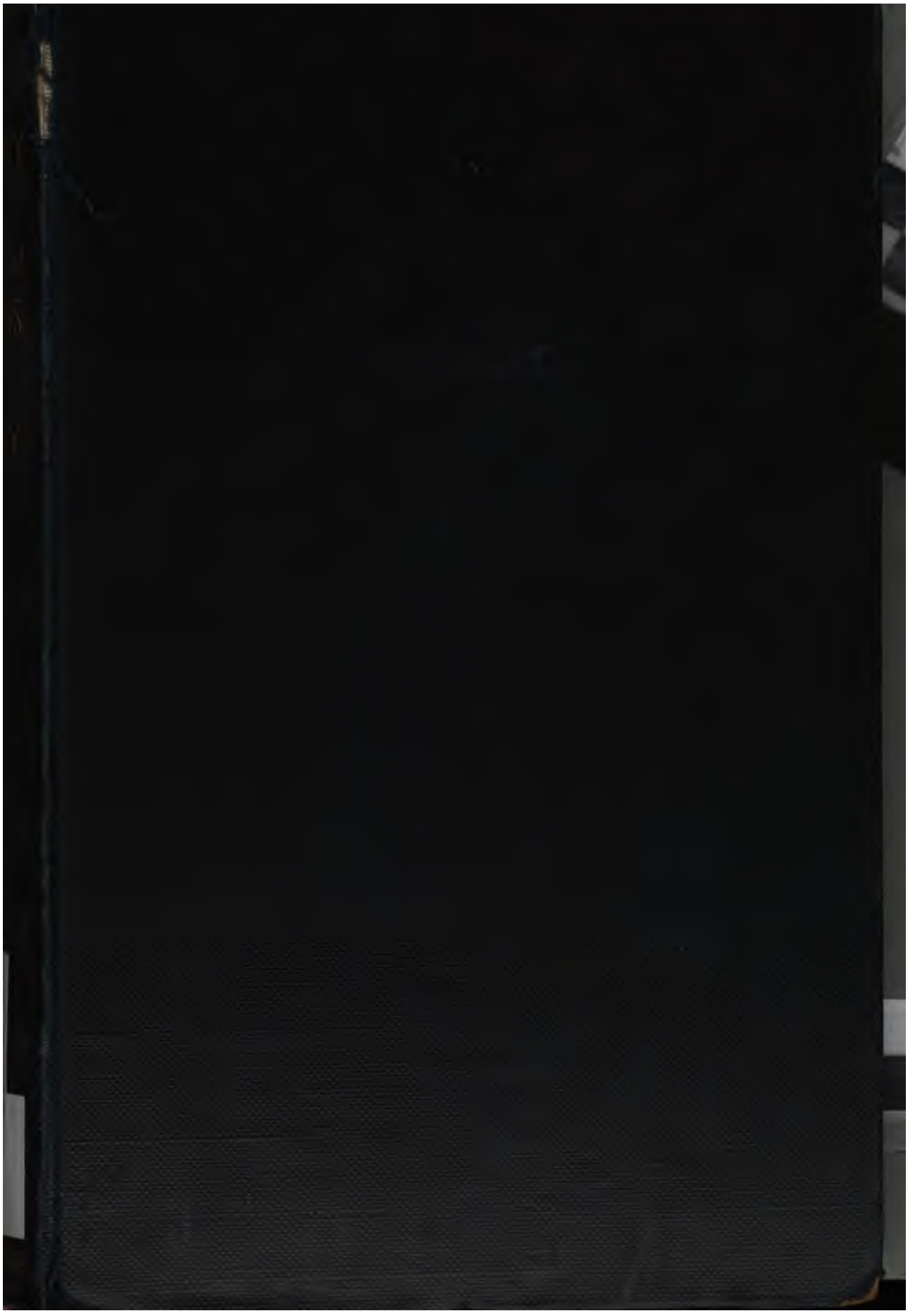

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THE LAW RELATING TO THE PROPERTY OF MARRIED PERSONS.

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THE LAW RELATING TO THE PROPERTY OF MARRIED PERSONS

WITH AN APPENDIX OF STATUTES AND NOTES.

BY

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GLASGOW

JAMES MACLEHOSE & SONS

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PREFACE.

THE following work is founded upon a lecture delivered in Glasgow last winter, and this accounts for its form. Its object is to state shortly the effect of marriage upon the property of the spouses, the claims of the children of the marriage and the rights of creditors on the bankruptcy of either of the parents or of the children. The common law is first explained,—to some extent in its historical development,—then the alterations made upon it by statute, particularly by the Married Women's Property Acts, and lastly the usual arrangements which are made by contract in lieu or in supplement of the provisions to which married persons and their children are legally entitled. Chapters II. and III., which treat of the common law, must therefore be read in connection with what follows. To prevent confusion I have given references in the footnotes to the principal statutory changes on the common law, and the index will in general show at a glance both what the law was and what it is.

I have to thank Mr. John A. Spens and Mr. George Guthrie for their kindness in reading the proof sheets and for many valuable suggestions.

DAVID MURRAY.

169 WEST GEORGE STREET,
GLASGOW, 31*st January*, 1891.

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THE PROPERTY OF MARRIED PERSONS.

CHAPTER I.

INTRODUCTORY.

Marriage as a partnership.

§ 1. According to Professor Erskine marriage creates a society or partnership between the married pair. If marriage is, in any sense, a partnership, it can only be of that description which was known, amongst Roman jurists, as leonine. The lion in the fable divided the prey into four shares, but devoured all four himself; so the law of Scotland speaks of a *communio bonorum* between husband and wife, but gives everything to the husband. Marriage was, however, a true partnership according to the old laws of the Norsemen and the customs of the ancient Germans. A community of property, *une communauté des biens*, between husband and wife—in which fact was not altogether at variance with language—formed part of the law of Holland, of Spain, and of France in those provinces which were governed by their own *coutumes*. Originally it applied only to the bourgeois and peasantry, but on the revision of the customs in the sixteenth century it was extended to the nobles of Northern France. The code civil, when these *coutumes* were abolished, retained *la régime de la communauté*, and made it, jointly

with another arrangement, the modern law of France;[1] and now, says M. Laboulaye, "Je ne sache point de jurisconsulte qui l'ait sérieusement attaquée."[2]

Betrothal wedding.

§ 2. Marriage in old times consisted of two distinct parts, the betrothal (*desponsatio et dotatio*), which was a civil contract, and the giving away (*traditio et sanctificatio*), which took place at the end of a year, when a priest was present and sanctified the union by his blessing. The former was the "wedding," so called from the weds or pledges between the bridegroom and the parents or guardians of the bride;[3]

[1] The two systems are *la régime de la communauté*, which represents that of the old German or native law; and *la régime dotal*, which represents that of the Roman law. "Under the *régime de communauté* the arrangement is that, subject to special stipulations, the husband and wife shall form a partnership, the husband to be the managing partner, and to account to the wife, in person if necessary, or by his representatives if she survives him, to their children, or her heirs, if he survives her. Under the *régime dotal*, the bargain is, that, in order to assist the husband to pay the expenses of the marriage, the wife or her family will pay the husband a sum of money, which he is to manage during the marriage, and for which he or his representatives are liable to her representatives after the marriage. If 'the dower [more properly dowry] is in danger,' he is liable at any time to be called to account as to his proceedings. Under either system the parents may, during their life-time, advance their children, but the interest of the children on the death of the parents is provided for, not as with us by clauses in the settlement, but by the general law as to inheritances."—*The Cornhill Magazine* (1863), vol. viii. p. 673.

[2] *Recherches sur la Condition des Femmes*, p. 380 (Paris, 1843); see also p. 396.

[3] See The Laws of King Edmund, *Ancient Laws and Institutes of England*, i. p. 255; Thrupp, *The Anglo-Saxon Home*, p. 46 (London, 1862). The *Regiam Majestatem* (ii. c. 13, ed. Innes, c. 16, ed. Skene) provides thus:—"Tenetur autem unusquisque tam de jure canonico quam jure seculari, sponsam suam dotare, tempore desponsationis." (Cf. Glanvil, xi. 1.) The concluding words refer to the ceremony at the church, but evidently relate back to the time when *desponsatio et dotatio* was an independent and anterior proceeding.

The use of the word *dos* is misleading. In Roman law it meant

and so necessary were they that they constituted a legal marriage, while the children of the undowered woman were illegitimate.[1] With the religious ceremony came the church-door gift and the Morning gift made to the bride.[2] Gifts.

a marriage portion, or *dowry*—the Scottish *tocher*. In the above passage from the *Regiam Majestatem* it means the English *dower*. *Dos* acquired this meaning at an early date. See *post*, § 113. In the *Formulae* of Marculfus it always refers to the property settled by the husband upon the bride. See also the very interesting *Formula sollemnis de dote* in the *Formulae Andegavenses*, Walter, *Corpus Iuris Germanici Antiqui*, vol. iii. p. 498. The husband after reciting the espousals grants to his espoused wife "*tam pro sponsalitia quam pro largitate tuae*" to be vested as at the wedding day.

Originally dower was only part of the bride-price paid to her father and settled on the daughter. The portion was the sum paid by the father to persuade a suitor to take a daughter off his hands. Dasent, *The Story of the Burnt Njal*, i. p. 27; Laboulaye, *Recherches*, pp. 84, 117; Maine, *Early History of Institutions*, p. 324.

[1] E. W. Robertson, *Historical Essays*, p. 173 (Edinburgh, 1872); *Scotland under her Early Kings*, ii. p. 326. See *Marriage in the German Middle Ages*, by Dr. E. Friedberg, *The Journal of Jurisprudence*, 1888, vol. xxxii. pp. 16, 67.

There is a form (No. 52) in the Appendix to Marculfus providing for succession in such a case. It recites, "Ideoque ego, ille, dum non est incognitum ut femina aliqua, nomine illa, bene ingenua, ad conjugium mihi sociavi uxore, sed qualis causas vel tempora me oppresserunt ut chartolam libelli dotis ad eam, sicut lex declarat, minime excessit facere, *unde ipsi filii mei, secundum legem, naturales appellantur.*" Walter, *Corpus Iuris Germanici Antiqui*, vol. iii. pp. 369, 430; Rozière, *Recueil Général des Formules*, No. 130, t. i. p. 166.

[2] Traces of this lingered on in Scotland until a comparatively recent date. An Act of Parliament in 1503 ratifies "the donation and gift of oure souerane Lady [Margaret of England] the qwenis drowry and morwyngift." Acts of the Parliaments of Scotland, ii. p. 240. In 1542 David Howeson of Anstruther was ordained by the Official Principal of St. Andrews to deliver to Agnes Anstrothir or Betoun a rose noble given by him as "dowry" to his wife, Marjorie Anstrothir, and 7 stones of lint or to pay her 7s. per stone as its value which he had promised at the church door to his wife as "mornyng gift," all of which she had bequeathed to the pursuer. *Liber Officialis S. Andree*, p. 143 (Abbotsford Club). When James VI. married Anne of Den-

Unity of person.

The shadow of the old custom still lingers but the substance is gone. "With all my goods I thee endow" is the promise required of the man by "The form of solemnization of Matrimony," but he gives nothing and takes all. The theory of the common law of England [1] is that husband and wife are *caro una et sanguis unus*,[2] but no new *persona* is created, as in the Scotch law of partnership. Husband and wife are one person, and, as it has been pithily put, the husband is that person. The *persona* of the wife is entirely eclipsed by that of the husband, which alone is recognized; "or at least," says Blackstone, "it is incorporated and consolidated into that of the husband, under whose wing, protection, and cover she performs everything." [3] Hence in English law the married state of the woman is technically referred to as *coverture*;[4]

mark, he gave her "in forme of morrowing gift" the Lordship of Dumfermline. Acts of the Parliament of Scotland, vol. iv. p. 24. See also Skene, *De Verborum significatione*, s.v. *Dos*.

It was only in 1833 that dower *ad ostium Ecclesiae* was abolished in England by 3 and 4 Wm. IV. c. 105, § 13.

[1] Glanvil, *De Legibus et Consuetudinibus Angliae*, xiv. c. 3; *Regiam Majestatem*, iv. c. 4 (ed. Innes, c. 5, ed. Skene); Bracton, *De Legibus Angliae*, 5. 5. 25, § 10 (Rolls Series, vi. p. 392); *Dialogus de Scaccario*, ii. c. 18; (Stubbs, *Select Charters*) p. 239 (ed. 1884). Tacitus, *De Germania*, c. 19, speaking of the German husband and wife, says they were "unum corpus unaque vita."

[2] This is not altered as regards third persons by the Married Women's Property Acts. A gift to a husband and wife and a third person is still to be construed as giving a quarter each to husband and wife and a half to the third person. In such a case husband and wife are still *caro una*. Jupp *v.* Buckwell, L.R. 39 Ch. D. 148. But see Byram *v.* Tull, L.R. 42 Ch. D. 306. Where "unity" does not prevail the result is, of course, different. Dias *v.* De Livera, L.R. 5 App. Ca. 123.

[3] In Scotland the expression was that the person of the wife is quodammodo sunk in that of her husband. Ersk. 1. 6. 25; Bell's 8vo Cases, p. 256.

[4] This term is not unknown in Scotland. Fountainhall (*Decisions*, ii. p. 220) speaks of *femme coverte*. The old Scots expression for a married woman is "cled with a husband," the native rendering of *vestita viro*.

husband and wife are known as *baron* and *femme*, and a married woman as *coverte de baron*.[1] Marriage by that law is an absolute gift to the husband of nearly all the property of the wife. He cannot grant or give anything to her because she is himself;[2] and if there are any compacts between them before marriage they are dissolved on marriage by the union of persons it creates. Her earnings belong to him at common law. She cannot sue for them; and if the employer paid the amount to the wife, her receipt was void, and the husband could recover payment a second time.[3] He may dispose of all her chattels personal, by deed or otherwise in his lifetime, or by his will. They are subject to his debts, and, in case of his intestacy, they form part of his general personal estate out of which his widow would merely be entitled to a distributive share, as she would be out of property which had originally been her husband's.

Disabilities of wife.

§ 3. The harshness of the common law was somewhat mitigated by the courts of equity. Equity long ago rejected the doctrine of a married woman having no personality,

Common law modified by equity.

See *e.g.* Balfour, *Practicks*, p. 93; Edmonstone *v.* Edmonstone, 1570, M. 5997.

[1] "Madam, we will have a trick for his trick; say you are my wife, and plead covert-bearn." Crowne, *The Country Wit* (1675), Works, iii. p. 102 (ed. 1874).

[2] "A feme covert cannot take anything of the gift of her husband," Co. Litt. 3. a. So too he cannot covenant with her: she cannot in law be convicted of stealing his property. While a husband could not at common law make a direct gift to his wife, he could do so through a trustee or otherwise See note to Coke upon Littleton *supra*. The result was the same under early Roman law, when the wife was *in manu* of her husband.

[3] Offley *v.* Clay, 2 Man. and Gr. 172. The common law of Scotland is pretty much the same, Henderson *v.* M'Callum, 1794; Hume, 202.

recognized that a married woman might possess separate property, that having property she might dispose of it at her own pleasure, that she might make contracts regarding it, and as a necessary consequence that she might be sued upon such contracts.

It was seen, however, that what was required was not an ingenious device for avoiding the consequences of the law, but a modification of the law itself, and this has recently been effected by statute, as will be hereafter explained.

ision of the ject.

§ 4. Turning now to the law of Scotland we shall consider—

(*a*) The effect of marriage upon the property of the spouses according to the common law.

(*b*) The disposition of that property which the common law makes upon the dissolution of the marriage by the death of either spouse.

(*c*) The modifications which have been made upon the common law by statute.

(*d*) The conventional arrangements by which the property of married persons is protected, and the interests of themselves and of their children therein are regulated.

(*e*) The effect of bankruptcy upon the property of married persons, and upon conventional provisions for married persons and their children.

CHAPTER II.

THE EFFECT OF MARRIAGE UPON THE PROPERTY OF THE SPOUSES ACCORDING TO THE COMMON LAW OF SCOTLAND.

§ 5. Immediately upon marriage the husband is by the common law of Scotland invested with what are known as his *jus mariti* and right of administration—his headship and gubernative administration as Fountainhall calls it:[1] and is constituted his wife's curator or guardian. In virtue of the *jus mariti* the husband becomes absolute owner, with a few trifling exceptions, of all the moveable property then belonging to the wife or subsequently accruing to her, capital as well as income, and, in virtue of his right of administration, of the income, but not of the fee of her heritable estate.[2] The assignation is complete—contrary to the rule in nearly every other case—without intimation, and operates all the world over.[3] While the marriage subsists the wife has no say in the disposal of anything that falls under the *jus*

Jus mariti and right of administration.

[1] Fountainhall, *Decisions*, ii. p. 220.

[2] Distinguish between *jus mariti* and right of administration. See Brodie's Stair, i. p. 30 n.; Fraser, *Treatise on Husband and Wife*, i. 676, 796; and Lord Gifford in Bryce's Trustee, 2 March, 1878, 5 R. 722. Cf. Dick *v.* Lady Pinkhill, 1709, M. 5999, and the Married Women's Property (Scotland) Act, 1881, § 1., sub-sec. 1, and § 2.

[3] Per Lord Meadowbank in Royal Bank *v.* Stein & Co's Assignees, 20 Jan. 1813, F.C.; S.C., Buchanan's Cases, p. 320, and 1 Rose Bank. Ca. App. 481; See also Selkrig *v.* Davies, 2 Dow, 230; S.C. 2 Rose Bank. Ca. 99. As to the present law, see *infra*, pp. 66, 79.

mariti.[1] She can only claim maintenance from her husband;[2] and even that is postponed to the payment of his debts. If he deserts her and she attempts to support herself by her own industry, all that she earns, all that she saves, becomes the property of the husband, and, if he becomes bankrupt, passes to his creditors. If during his lifetime she has been imprisoned upon a false charge, she cannot recover *solatium* after his death, because, it is said, the claim for damages vested in the husband *jure mariti* and was transmitted to his executor.[3]

Foundation of husband's rights.

§ 6. The theory of the law is that the property of the spouses constitutes a common stock, the administration of which is vested in the husband during the marriage. The *jus mariti*, it is said, is purely a right of administration, and it is in virtue of this, it is suggested, that the husband obtains the practical ownership of the goods in communion.

[1] See for instance per Lord Jeffrey in Campbell *v.* Stewart, 13 June, 1848, 10 D. at p. 1283. As to the present law, see *infra*, pp. 66, 76.

[2] "Maritus enim debet alere uxorem, sive dotatam sive indotatam; et si non fecerit, jure canonico excommunicatur; quia qui indotatam accipit, sibi imputet," was the rule of the Canonists. *Dos* is here used in the Roman sense of dowry or portion.

In a curious case, The Lady Kinfauns *v.* The Laird of Kinfauns, 1711, M. 5882, the court held that if the lady's sickness requires it, and the husband's fortune can bear it, he is obliged to promote the cure, though it be by going to the baths or other medicinal water. The celebrated Dr. Pitcairn recommended that the Lady Kinfauns should go "to the warm baths in England or to the waters of Aix-la-Chapelle." The physicians consulted by the husband "attested the use of medicines at home might as probably recover her." The judges in giving judgment put the case of the lady having made the journey by sea and being carried by pirates into Dunkirk: behoved he not to have ransomed her? they say.

[3] Milne *v.* Gauld, 14 Jan. 1841, 3 D. 345. Where, however, the husband has renounced his *jus mariti*, a married woman has been held entitled after his sequestration to sue an action for personal injury without the appointment of a *curator ad litem* and without finding caution. Horn *v.* Sanderson, 9 Jan. 1872, 10 M. 295.

On the other hand, it has been remarked by Professor Bayne, that "the rights competent to the husband, and the obligations prestable from him, are more properly to be explained and accounted for from the personal subjection of the wife than from the alleged *communio bonorum* created by the marriage."[1] This was the theory of the older writers, who, bearing in mind the *manus* of Roman law, said that *de jure* the wife was "in potestate viri sui," and that consequently her dower and other things were in his disposition, and that he was "dominus omnium quae fuerunt uxoris suae."[2] Although this language was probably derived from the Civilians, the idea was not. What is thus described is, no doubt, a form of the German *Mund*, which, although in many respects similar to the Roman *manus*, was still essentially different. From the *Mund* was developed community of goods and the conjugal partnership.[3]

Mund. Manus.

[1] Bayne, *Notes for Students of the Municipal Law*, p. 22 (Edinburgh, 1731). From Sir P. Home's report of the case of Earl of Leven *v.* Montgomery, M. at p. 5817, it would appear that in 1683 it was contended that there was no true *communio bonorum* in the law of Scotland.

[2] *Regiam Majestatem*, ii. 13 (ed. Innes; c. 16, ed. Skene); Glanvil, vi. 3; *Quoniam Attachiamenta*, c. 16 (ed. Innes; c. 20, ed. Skene). In a MS. copy in my possession, the expression is "sub virga et potestate mariti." Bracton distinguishes between those who are *in tutela*, *in curatione*, and *sub virga*. Wives are in the last category. *De Legibus Angliae*, i. 10. 2. Coke treats *coverture* as the equivalent of *in potestate*. Co. Litt. 112 a. The disposing power of the husband is apparently borrowed from the late Roman law as regards dotal property, which was a very different matter.

[3] Laboulaye, *Recherches*, p. 137 and *seqq.* A very interesting form of marriage ceremony, under the form of a suit at law, is preserved in the *Formulae Longobardicae*. The parties having expressed their willingness to accept of each other, the bridegroom is asked to give a "wed" that he will provide the bride with one third of all the property he then had or which he might acquire, moveable and immoveable, under penalty of ten pounds of gold. A symbolical action with sword and cloak follows, after which the wed which the bridegroom had given to

Communio bonorum in Scots law.

§ 7. The expression *communio bonorum* is of comparatively recent use in Scots law, and is stated not to be found before the time of Charles II.[1] It has been suggested that the thing itself never existed, and that the term was introduced for the purpose of explaining the rights which accrue to a surviving wife and children on the death of the husband and father.[2] This, however, is still perhaps open to question. In countries where *communio bonorum* did undoubtedly exist, the position of the husband was very similar to that of a Scotch husband. He was sole *dominus* and absolute owner of the goods in communion, and the rights of the wife only emerged upon her survivance.[3] During the marriage they existed only in hope.

the bride *ad legitimum conjugium*, is restored and he is put *sub mundio* with all her property moveable and immoveable, and the bridegroom gives a "wed" to receive her. Then the bridegroom pledges (*subarret*) her with a ring. The Deed of Gift and of Dower (*cartula donationis et dotis*) is read, and the woman is given to the husband as wife. Walter, *Corpus Iuris Germanici Antiqui*, vol. iii. pp. 556, 557; Pertz, *Monumenta Germaniæ Historica*, *Leg.* t. iv. 599.

[1] While this may be so, community seems to be assumed in some of our old laws.

[2] Fraser, *Treatise on Husband and Wife*, i. p. 660 *et seqq*; Shearer *v.* Christie, 18 Nov. 1842, 5 D. 132; Wight *v.* Brown, 27 Jan. 1849, 11 D. 459; Muirhead *v.* Muirhead's Trustee, 6 Dec. 1867, 6 M. 95; Fraser *v.* Walker, 21 June, 1872, 10 M. 837; Grant's Trustees *v.* Ritchie, 3 March, 1886, 13 R. at p. 650.

[3] See Pothier, *Traité de la Communauté*, § 3 *et seqq.* (Œuvres par Bugnet, t. vii. p. 57, Paris, 1861); Laboulaye, *Recherches*, pp. 336, 387. The suggestion that the Scotch law followed the custom of Normandy, under which the position of the wife was very much what it is in Scotland, is not altogether satisfactory. It seems a coincidence rather than a reproduction.

During the marriage the husband as regards the goods in communion was said to be *dominus in actu*; the wife had only interest *habitu* which *exit in actum* at the dissolution of the marriage. Sir George Mackenzie, *Institutions of the Law of Scotland*, Part I. tit. 6; Forbes' *Decisions*, p. 649. This was precisely the language

Be this as it may, the phrase has a definite meaning, but is of little importance save as the correlative of *jus mariti*. It is practically the equivalent of the estate over which that right extends.

§ 8. The Greek name for a dowry is φερνή, and by the Roman lawyers that part of a married woman's property which she retained from the *dos* was styled *paraphcrna*,[1] and continued to be her own. The word is still in use in Scotland, but in a limited sense. With us a wife's *paraphernalia* remains her separate property, and is not affectable by her husband's creditors,[2] but the term comprehends merely her wearing apparel, with such articles of furniture as are required for keeping it,[3] and her jewels,[4] ornaments and trinkets with their cases, and gifts by the husband to the Paraphernalia.

used in places where *communio bonorum* undoubtedly existed. Thus Du Moulin, writing on the "Coutume de Paris" (Art. 109), says that community is rather *in habitu quam in actu*, and the wife during her marriage *non est proprie socia, sed speratur fore.*

Lord Fraser argues against the existence of *communio bonorum* on this very ground (*Husband and Wife*, i. p. 671), although it did not affect the *communio* where it existed.

[1] Emperors Theodosius and Valentinian, Cod. Just. 5. 14. 8. This definition is practically adopted in the Code Civil, § 1574; "all the property of the wife which has not been settled in dowry, constitutes paraphernalia." Settlement by dowry is, as above stated, the alternative in France to settlement by community.

[2] The common law of England was different. A married woman had no right to her paraphernalia until her husband's death, Comyn's Digest, F. 3. He could give them away, sell or pledge them, Seymore *v.* Tresilian, 3 Atk. 358, and they were liable to his debts, Tipping *v.* Tipping, 1 P. Wm. 730; White and Tudor, *L.C.* i. 621 (ed. 1886).

[3] A wardrobe was held paraphernal although it was occasionally used by the husband, Cameron *v.* M'Lean, 5 Feb. 1876, 13 S. L. R. 278.

[4] In the case of the Earl of Leven *v.* Montgomery, 1683, M. 5803, it was found that the great jewel gifted to Alexander Lesly, first Earl of Leven, when a general in Germany, by Gustavus Adolphus, King of Sweden, was not paraphernal but an heir-loom which belonged to the family.

bride on or before the marriage day.[1] Her other wedding presents and outfit (*apparatus s. instructus muliebris*), such as a work-table, mirror, plate, and her ordinary contribution to the domestic furnishing—the napery—are not paraphernal, but belong to the husband and his creditors under the lying phrase goods in communion.[2]

Morning gift.

§ **9.** The constituting the husband's bridal gifts paraphernal seems to be a relic of the Morning gift (*morgengiva*, the German *Morgengabe*), which remained the wife's property.[3] In 1542 the executrix of a deceased wife successfully claimed from her husband the value of 7 stones of lint promised to her as Morning gift.[4]

Purse-pennies.

Amongst *paraphernalia* purse-pennies are also included.[5] This is a survival of the ancient "weds" or *arrhae sponsales*,[6] or perhaps of the church-door gift (*dos ad ostium ecclesiae*). In the case in 1542, just mentioned, the executrix

Church-door gift.

[1] One of the leading authorities upon paraphernalia is Dicks *v.* Massie, 1695, M. 5821, a case on which a vast quantity of curious learning was expended, including "the Spanish and Italian Doctors," Julius Clarus and the rest.

[2] Hewat *v.* Wood, 1803, Hume, 210.

[3] Riddell, *Law and Practice of Scottish Peerages*, i. p. 489; *Tracts Legal and Historical*, p. 208; Leges Henrici Primi, lxx. 22, *Ancient Laws and Institutes of England*, vol. i. p. 413. The date of this compilation is now definitely referred to the period between 1108 and 1118. Stubbs, *Select Charters*, p. 104.

[4] *Liber Officialis S. Andree*, p. 143, *supra*, p. 3. See also Riddell *Tracts*, *supra*; Craig *v.* Monteith, 1684, M. 5819.

[5] Purse-pennies are paraphernal, Lady Bute *v.* The Earl, 1711, M. 5824; Fountainhall, ii. p. 744. In this an interesting list is given of what might be so considered—"Spanish pistols, French louidores' Hungary ducats, English Jacobus's and Carolus's."

[6] As to these see Smith, *Dictionary of Christian Antiquities*, s.v. Marriage; Thrupp, *The Anglo-Saxon Home*, p. 48; Pothier, *Traité du Contrat de Mariage*, § 42 *et seqq.* (Œuvres), t. vii. p. 18; *supra*, p. 10 n. They were something like the marriage "*per solidum et denarium*" of the Salic Law. Rozière, *Recueil Général des Formules*, t. i. p. 277-280.

claimed a rose noble gifted by the husband to his wife *ad fores ecclesiae.* Another claim she made was for the wedding ring. Seven years after this decision, King Edward VI.'s Prayer Book was published, and in it the man is directed at the time of marriage to "give unto the woman a ring and other tokens of spousage, as gold or silver, laying the same upon a book."[1] This is but a translation from the Service books in use in the Roman Catholic Church in England and Scotland[2] at the time, which faithfully embodied the law requiring the bride to be dowered, but which for centuries was satisfied by an elusory gift, and which, even under the influence of Scottish Presbyterianism, has remained almost to our own day.

Lady's-gown.

§ **10.** One other thing allowed to the wife as her own is Gown or Lady's-gown,[3] the present sometimes made by a purchaser to a wife on the sale of part of her husband's land[4] in which she has a contingent right as *tercer.*[5] This is known as her *peculium,* which, according to Ulpian, is *quasi pusilla pecunia sive patrimonium pusillum,* a small sum of

Peculium.

[1] *The two Liturgies, with other documents set forth in the reign of King Edward VI.*, p. 129 (London, 1844, Parker Society). In the Liturgy of 1552 the "gold or silver" is omitted. *Ib.* p. 304. Its use was spiritualized away by Martin Bucer; quoted Whitgift's Works, iii. p. 354 (Parker Society, 1853).

[2] Sarum Ritual, Maskell's *Monumenta Ritualia*, i. p. 44, 47; iii. p. 384.

[3] It is a question, however, whether gown has not a totally different origin. In the old Welsh laws a wife's "*gowyn* is, if she detected her husband with another woman, let him pay her six score pence for the first offence, for the second one pound; if she detects him a third time, she can separate from him, without losing anything that belongs to her." Venodotian Code, 2. 1. 39, *Ancient Laws and Institutes of Wales*, vol. i. p. 93.

[4] Mungel *v.* Calder, 1750, M. 5771. The sum here was 20 guineas stg.; Lady Pitfirran *v.* Wood, 1709, M. 5799. The amount in this case was 100 guineas stg.

[5] According to the *Regiam Majestatem* and Glanvil terce was payable from the land in which the husband was infeft at the date of the

money as it were or a small patrimony,[1] which is certainly true of what passed under this name in Scotland. Like *paraphernalia* it is not attachable by the husband's creditors.

Wife's heritable estate remains her own.

§ 11. While the wife's moveables pass to the husband, and become liable for his debts, and subject to his disposal, her heritable estate, that is land, houses, leases, and the like, annuities[2] and rights having a *tractus futuri temporis*,[3] bonds bearing annual-rent[4]—or *feuda pecuniæ*, as the old lawyers styled them—after the term of payment, such as the bonds, debentures, or mortgages of public trusts and companies,[5] remains her own. But the mortgages or bonds of companies under the Companies Clauses Consolidation (Scotland) Act,[6] and under certain local Acts of Parliament, are moveable, and therefore subject to *jus mariti* and now to *jus relicti*.[7]

marriage, now it is from the land in which he dies infeft. Curiously, this is the old Saxon law in force before Glanvil's time. The *coutumes* of France varied very much upon the subject. Pothier, *Traité du Douaire*, § 10 *et seqq.* (Œuvres, ed. Bugnet, t. vi. p. 321, Paris, 1861). The former custom seems to explain lady's-gown. See *post*, § 48.

Land subject to dower or terce could only be effectually alienated by the husband with the wife's consent. Balfour's *Practicks*, p. 111; *Regiam Majestatem*, ii. c. 18, ed. Innes.

[1] D. 15. 1. 5 § 3. He seems to make *peculium* a diminutive of *pecunia*. Rather, however, both are connected with *pecus*. See Laurentius Valla in the *Opuscula Varia de Latinitate Jurisconsultorum Veterum*, ed. Duker, p. 53 *seqq.* Lugd. Bat. 1711.

[2] Reid *v.* M'Walter, 5 Feb. 1878, 5 R. 630. This is to be distinguished from the fruits or interest of a principal sum for a series of years, which are moveable. Hill *v.* Hill, 21 Dec. 1872, 11 M. 247.

[3] What is meant by *tractus futuri temporis*, see per Lord Pitfour in Philp *v.* Corrie, 1765, 5 Br. Sup. 469, 908; Bell, *Pr.* § 1480, *Ill.* ii. p. 264.

[4] They were declared moveable except as regards the Fisc and Husband and Wife, by 1661, c. 32. Appendix, p. 173.

[5] So decided as to a mortgage or bond by the Glasgow Waterworks Commissioners; Downie *v.* Downie's Trustees, 14 July, 1866, 4 M. 1067. 8 Vict. c. 17, § 46; cf. 25 and 26 Vict. c. 89, § 22.

[7] *E.g.* The Clyde Navigation Act, 21 and 22 Vict. c. 149, § 61.

Rents fall under jus mariti.

§ 12. Industrial fruits of land are moveable, and so are rent and other annual returns from land and from other heritable rights after the terms of payment, and all fall to the husband during the subsistence of the marriage. The whole of the wife's rent, dividends, and interest, and the termly payments of an annuity[1] might consequently be swept off by the creditors of a bankrupt husband during his lifetime. He has, however, no control over the fee of his wife's heritable property, which belongs to her and her own heirs, of whom he is not one, unless by provision.

Husband must consent to wife's deeds.

§ 13. The wife's civil capacity is suspended by the marriage, and she becomes practically a minor, not from want of a disposing *mind* as in the case of a minor, but from want of disposing power.[2] Her husband's consent is, therefore, requisite to every deed she grants, and without this it is bad. But that consent will not validate a deed which is challengeable upon other grounds. If the wife during minority grants a lease of her heritable estate, she will be entitled to reduce it, within the *quadriennium utile*, on the ground of enorm lesion, although her husband was a consenter.[3]

Wife has no persona standi in judicio.

The wife has no *persona standi in judicio*, and she can neither sue nor be sued in respect of her separate estate, unless her husband be joined with her; "to fortifie, assist, and authorize hir," says an old writer.[4] Age has nothing to do with the matter; for if a woman of 50 marries a youth of 21, he becomes *ipso jure* her curator, and without his consent she cannot deal in any way with her own property.

[1] See per Lord Gifford in Reid *v.* M'Walter, 5 Feb. 1878, 5 R. at p. 632.

[2] This is an English statement, but is equally applicable to Scotland. See Lush, *Married Women's Rights and Liabilities*, p. 26 (London, 1887). Fraser, *Husband and Wife*, i. pp. 517, 520.

[3] Gibson *v.* Scoon, 6th June, 1809, F.C.

[4] Balfour, *Practicks*, p. 93; *Quoniam Attachiamenta*, c. 22.

The authority is appendant to the relation not to the person.[1] She cannot, without his concurrence, validly pledge her wedding ring or sell a trinket. In 1711 "the Lords, by a scrimp plurality, found wives had the sole administration of their jewels when in straits to raise money," but "some merrily said this was too great an interlocutor in favours of women";[2] and on second thoughts the majority came to this conclusion, for when the point again arose, in 1754, the court unanimously decided that the wife of a journeyman tailor could not validly pledge a ring without her husband's consent.[3]

Donationes inter virum et uxorem forbidden by civil law.

§ 14. By the civil law a husband could not during marriage make a gift to his wife, nor a wife to her husband. A conveyance with this object conferred no ownership; *stipulationes* were not binding; *acceptilationes* were no release. The reason assigned by the Emperor Antoninus was that marriage is the product of honourable love, and harmony should not in appearance be purchased by money.[4] Some exceptions were permitted. It was a Roman custom that husbands made presents to their wives on the Kalends of

[1] If the husband be under 21, that is himself a minor, his own curators must concur in his concurrence. See Fraser, *Husband and Wife*, i. p. 517. In Mackenzie *v.* Mackenzie's Trustees, 10 July, 1878, 5 R. 1027, the Court appointed a *curator ad litem* to the wife.

[2] Pringle *v.* Irvine, 1711, M. 5970; Fountainhall, ii. 660; followed in 1717 in Clerk *v.* Sharp, M. 5996.

[3] Anonymous, 1754, 5 B. S. 811; Gemmil *v.* Yule, 1735, M. 5997. This was the ancient rule. See *Regiam Majestatem*, iv. c. 32, ed. Innes.

[4] The *Regiam Majestatem* (ii. c. 12, ed. Innes, or c. 15, ed. Skene) repeats the reason of Ulpian, Dig. 24. 1. 3 pr. In the old translation "All other gifts, except the gifts foresaids, are discharged, and forbidden betwix husband and wyfe, that they throw great affection of mutual love betwix them, they spuilzie not other, that they become pure and beggars." (*Regiam Majestatem . . . translated out of Latine in Scottish language.* Edinburgh, 1609 fol.

March and wives to their husbands on the Saturnalia—the merry makings of December. These[1] and birthday presents, of moderate amount, were allowed; as were gifts to take effect only on the dissolution of the marriage. Gifts by a wife to her husband to enable him to acquire senatorial or equestrian rank, or the like honour, were valid.[2] Hence a present to defray the expenses of standing for office or of the games was allowed, just as in Scotland the preservation of the political influence of a great family has been claimed to be a proper act of administration by a tutor-in-law.[3]

By law of Scotland good if not revoked.

§ 15. The Scots law, like most of the *coutumes* of France,[4] adopted the principle of the Roman rule as to donations, but without the exceptions, and not to its full extent. With us donations *inter virum et uxorem* are effectual if not revoked.[5] They may be revoked at any time during the marriage, and even after its dissolution,[6] not-

[1] Dig 24. 1. 31 § 8.

[2] Dig 24. 1. 42; 24. 1. 40.

[3] Graham *v.* Hopeton, 1798, M. 5599. Here the Court refused to allow a tutor to take credit for sums expended by him in "political operations" for the benefit of the pupil on the ground, apparently, that the ward was a lunatic.

[4] An interesting account of this branch of the law in France will be found in Pothier, *Traité des donations entre Mari et Femme*, Œuvres, ed. Bugnet, t. vii. p. 499 and *seqq.* (Paris, 1861).

[5] This is the rule laid down in the *Regiam Majestatem*, ut supra: "*si talis donatio facta in vita donatoris, manet rata, ejus obitu confirmatur.*"

This chapter of the *Regiam Majestatem* is one of those for which there is no equivalent in Glanvil. Bracton, however, deals with the subject (ii. 12) almost in the same terms as the *Regiam Majestatem*. See also Britton, 2. 3, §§ 6 and 11; Fleta, 178; Fragmenta Collecta, No. 12; Acts of the Parliament of Scotland, vol. i. p. 732; Sachsenspiegel, Art. 31, § 2; Laboulaye, *Recherches*, p. 282.

[6] Edward *v.* Cheyne (No. 2), 1888, L.R. 13 App. Ca. p. 385; S.C. 15 R. 37 H. L. See also Cousin *v.* Caldwell, 5 June, 1838, 16 S. 1109; Melville *v.* Melville's Trustees, 15 July, 1879, 6 R. 1286.

withstanding a clause importing irrevocability,[1] and not only by the donor spouse, but by his or her *curator bonis* in case of insanity,[2] or by the creditors[3] in case of insolvency. Sequestration, indeed, is *eo ipso* revocation.[4] The heirs of the donor cannot, however, revoke.

Remuneratory donations.

§ 16. While pure donations are thus ambulatory, husband and wife may enter into contracts with each other, and donations made for valuable consideration cannot be revoked.[5] These are known as remuneratory grants or remuneratory donations.[6] Consideration must, however, be proved, or otherwise donation, which implies no consideration (*liberalitas nullo jure cogente facta*), is presumed. The consideration in such cases is often the abandonment of the legal rights of one or other of the parties, or of both,[7] but the renunciation by a married woman of the rights conferred upon her by an ante-nuptial contract of marriage is a donation, and therefore revocable, unless an equivalent is given.[8] What is sufficient consideration to support a transaction and convert it from donation into remuneratory grant is a question of

[1] Cousin v. Caldwell, *supra*; Jardine v. Currie, 17 June, 1830, 8 S. 937.

[2] Blaikie v. Milne, 14 Nov. 1838, 1 D. 18.

[3] Shearer v. Christie, 18 Nov. 1842, 5 D. 132.

[4] Kemp v. Napier, 1 Feb. 1842, 4 D. 558; Honeyman v. Robertson, 7 Dec. 1886, 14 R. 163.

[5] Shaw's Trustees v. Shaw, 19 Jan. 1870, 8 M. 419; Standard Property Investment Company v. Cowe, 20 March, 1877, 4 R. 695.

[6] Erskine, I. 6. 31; Fraser, *Husband and Wife*, ii. 940. See also Pothier, *Traité des Donations entre Mari et Femme*, § 118 *et seqq.* In France such gifts are known as "mutual or reciprocal gifts."

[7] The rule is the same in England: See Hewison v. Negus, 16 Beav. 594.

[8] Thomson v. Thomson, 20 February, 1888, 16 S. p. 641; Rae v. Nielson, 14 May, 1857, 2 R. p. 676; Melville v. Melville's Trustees, 19 July, 1879, 6 R. 1286; Jardine v. Currie, 17 June, 1830, 8 S. 937.

circumstances;[1] but it may flow from a third person as well as from one of the spouses.[2] A gift, again, may be of the nature of a post-nuptial provision, and this will, if it complies with certain conditions, hereafter to be explained, be sustained, and not be revocable.

Old doctrine that *jus mariti* could not be renounced or excluded.

§ 17. At one time the opinion prevailed that the *jus mariti* was so inseparably associated with the husband, as head of the family, that he could not renounce it, and that the wife could not reserve the administration of her own property to herself.[3] It was ingeniously argued that such a renunciation or reservation, being a right conceived in favour of the wife, fell under the *jus mariti* and so disappeared, according to the brocard *vinco vincentem vinco te.* In the language of the day the *jus mariti* was a faculty so inseparable from the character of husband that any reservation thereof by the wife or renunciation by him before the marriage always ran back upon him, as water thrown upon a higher ground doth ever return.[4]

Same opinion as to right of administration.

§ 18. In a similar way it was argued that the right of administration could not be excluded, for, "both by the laws of God and the land, the husband was *princeps et caput familiae,* and to divest him of that power, and invest it in the wife, was against the laws of nature and *contra bonos*

[1] See Hepburn *v.* Brown, 1814, 2 Dow App. Ca., 342; Beattie's Trustees, 23 May, 1884, 11 R. p. 846; Hewison *v.* Negus, *supra*, p. 18.

[2] Forbes *v.* City of Glasgow Bank, 28 June, 1879, 6 R. 1122.

[3] So stated by Sir George Mackenzie, *Institutes of the Law of Scotland*, Part I. tit. 6, p. 50. (Edinburgh, 1684, 12mo.)

[4] Stair, 1. 4. 9; Forbes, *Institutes of the Law of Scotland*, i. p. 63; Kilkerran, *Husband and Wife*, No. 8, p. 260; Nicolson *v.* Inglis, 1678, M. 5834; Vallance *v.* M'Dowall, 1709, M. 5840; Campbell *v.* Sandilands, 1682, M. 5836; Trotter *v.* Campbell, 1682, M. 5836. In Thomson's Trs. *v.* Thomson, 9 July, 1879, 6 R. 1227, a similar argument was attempted, but was overruled; see per Lord Gifford at p. 1231.

Now settled otherwise.

mores,"[1] and so the Court ruled in 1667. Waxing bolder their successors of 1745 did violence both to "the law of nature and the rules of morality," and decided that a husband could renounce his right of administration,[2] and so the law still stands.

Jus mariti may be renounced or excluded.

§ 19. In 1730 it was determined that the husband could renounce his *jus mariti* and that it did not fall *sub communione*;[3] and it is now settled that a husband may renounce his *jus mariti* as to the whole of his wife's estate or as to any part of it, *per aversionem* or specifically, and as to *acquirenda* as well as to *acquisita*,[4] and it may be excluded by a third person, in a conveyance of property or in any obligation of debt in favour of the wife. No technical language is required: any clearly expressed intention is sufficient,[5] even an entry in the husband's private cash-book;[6] and a renunciation may be inferred from facts and circumstances.[7]

[1] Collington *v.* Collington, 1667, M. 5828; Dick *v.* Lady Pinkhill, 1709, M. 5999; but see Humbie *v.* Hume, 1634, M. 5933. As Lord Deas remarked in M'Dougall *v.* City of Glasgow Bank, (20th June, 1879, 6 R. at p. 1091) the old writers "seemed to find authority in the Bible for it—that because man was made first he was the nobler person." This was the French doctrine. Pothier, *Traité de la communauté*, § 415, t. vii. p. 50; *Traité du Douaire*, § 3, t. vi. p. 316. *Traité des donations entre Mari et Femme*, § 23, t. vii. p. 457. So, too, by the Code Civil married persons cannot derogate from the rights which belong to the husband as head. Art. 1388.

[2] Trustees of Murray *v.* Dalrymple, M. 5842 and 2273; Keggie *v.* Christie, 25 May, 1815, F.C.

[3] Walker *v.* Creditors of her Husband, 1730, M. 5841.

[4] M'Dougall *v.* City of Glasgow Bank, 20 June, 1879, 6 R. p. 1089: correcting 1 Bell, *Com.* p. 638 (5th ed.), p. 684 (7th ed.).

[5] Irvine *v.* Connon's Trustees, 8 March, 1883, 10 R. 731; M'Dougall *v.* City of Glasgow Bank, *supra*.

[6] Smith *v.* Smith's Trustees, 26 Nov. 1884, 12 R. 186.

[7] Davidson *v.* Davidson, 28 March, 1867, 5 M. 710; but see Henderson *v.* Henderson, 25 Oct. 1889, 17 R. 18.

§ 20. After it had been determined that the *jus mariti* and right of administration could be renounced or excluded as regards the husband, it was still doubted whether this was effectual in a question with creditors. It was contended that they were entitled to rely upon the marriage and to assume that the husband was possessed of the rights the law conferred upon him. It is now, however, quite fixed that the renunciation or exclusion is effectual against creditors both as respects *acquisita* and *acquirenda*, and that it requires no intimation. "No party has a right to assume that a wife was married without a marriage-contract, and that all her moveable property must have passed to her husband by the operation of law. Parties interested must inquire what were the actual conditions of the marriage." [1]

Such exclusion binding upon creditors.

§ 21. The effect of the exclusion or renunciation of the *jus mariti* is to leave the wife's moveable estate in her own person as if she were unmarried;[2] but as a married woman she can do no act concerning it except with consent of her husband. His signature, for example, is necessary to validate her receipt for her income or for her rents. The effect of the exclusion or renunciation of the right of administration is that the wife may deal with her separate estate both heritable and moveable as if the husband did not exist.[3]

Effect of exclusion of *jus mariti*

and of the right of administration.

[1] Per Lord Mackenzie *primus* in Rollo *v.* Ramsay, 28 Nov. 1832, 11 S. 132. *Post*, § 122.

[2] See per Lord Deas and Inglis, L.P., in Biggart *v.* City of Glasgow Bank, 15 Jan. 1879, 6 R. 470, *infra*, pp. 67, 76.

[3] Fraser, *Husband and Wife*, pp. 572, 813 *seqq.* Per Lord Gifford in Standard Property Investment Co. *v.* Cowe, 20 March, 1877, 4 R. at p. 703. In England renunciation alone by an intended husband of his marital rights in his wife's real estate is not, owing to the operation of the Statute of Frauds, sufficient to clothe her with testamentary power or to constitute a valid declaration of trust after fee. The agreement must be signed by the wife as well. Dye *v.* Dye, L.R. 13,

Liability of husband for wife's debts.

§ 22. As the *jus mariti* transfers to the husband the wife's moveables and the income of her heritage, so it imposes upon him during her life time—but no longer, unless he is *lucratus* by the marriage—liability for the debts contracted by her before marriage, other than heritable debts and debts affecting her heritage[1] or other separate estate, when by convention she has such estate.[2] As has been quaintly said, "marriage was a voluntary novation, whereby the husband *subibat personam mulieris* and undertook all her debts, which are compensated by the marital affection to her person with her fidelity and other qualifications."[3] According to the French adage, *qui épouse la femme épouse les dettes.* Amongst these the law of Scotland includes the natural obligations which rest upon her. Hence the husband must aliment not only his mother-in-law if she is in want, but his father-in-law, his wife's children by a former marriage, and her children without marriage.[4] Damages payable for a wife's delict or quasi delict, *e.g.* slander, are not, however, a debt for which her husband is liable,[5] but her separate estate, if she has one, is liable.[6]

Wife cannot grant a personal obligation.

§ 23. Another result of the subordination of the wife is that she cannot become a debtor. The personal obligation of a married woman is of no legal effect;[7] she is not liable to

Q. B. D. 147. *A feme coverte* in England had under the old law no testamentary capacity.

[1] This was only settled in 1696, Osborn *v.* Young, M. 5785. The decision was founded upon the Coutume de Paris, see M. 5788.

[2] Wright's Executors *v.* City of Glasgow Bank, 24 Jan. 1880, 7 R. 527; Biggart *v.* City of Glasgow Bank, 15 Jan. 1879, 6 R. 470.

[3] He is even liable for her wedding clothes, Neilson *v.* Guthrie, 1672, M. 5878: and for her school fees and board, Leslie *v.* Wallace, 1708, M. 5853.

[4] As to the present law, see § 81.

[5] Barr *v.* Neilsons, 20 March, 1868, 6 M. 651; Ersk. i. 6. 24.

[6] For form of decree, see Scorgie *v.* Hunter, 22 Feb. 1872, 9 S.L.R. 292.

[7] Per Lord Fullerton, in Thomson *v.* Stewart, 11 Feb. 1840, 2 D. 571. The law is here very carefully stated. See Stair, 1. 4. 16: Ersk. 1. 6. 25.

the consequences of a personal decree. She cannot enter into a contract so as to give a personal remedy against her. "A married woman," says Braxfield, L. J. C., "can grant no personal obligation: such obligation is null and void, because in law a wife has no person."[1] If she has a separate estate she can, with consent of her husband, bind it, but she cannot bind herself personally. It is the property, not herself, that is the debtor. The liability is *in rem* as distinguished from *in personam*.[2] Hence, when a security is taken over a married woman's landed estate, the husband grants the personal obligation and she dispones the land in security.[3]

Law of England the same.

§ **24.** The law in England is the same as regards a wife's contracts. At common law she cannot bind herself but only her separate estate; but it is only the separate estate of which she was possessed at the time of giving the undertaking that she could so bind and that her creditor could attach.[4] It was only *acquisita* not *acquirenda* that she could dispose of; because as a married woman she had no power to bind what she was not yet possessed of. This was altered by Statute in 1882,[5] but the law still stands that to make the contract of a married woman effectual against her separate estate she must have had some property at the time. These rules have not prevailed in Scotland.

[1] Harvey *v.* Chessels, 1791, Bell, 8vo Ca. at p. 258.

[2] Aylett *v.* Ashton, 1 My. and Cr. 105; *Ex parte* Jones, *In re* Grissell, L.R. 12 Ch. D. 484.

[3] It has been held that a disposition by a married woman of her heritage without consent of her husband is null and void, although the husband was abroad at the time and the deed contained a power of redemption in his favour. Boyle *v.* Crawford, 5 March, 1822, 1 S. 372.

To a similar effect, see Rennie *v.* Ritchie, 1845, 4 Bell App. 221.

[4] There is an admirable exposition of the law by the Earl of Selborne, L.C., in Cahill *v.* Cahill, 1883, L.R. 8 App. Ca. at p. 425 *et seqq.*

[5] The Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), § 1.

Exceptions—1. Trade obligations where wife has separate estate.

§ 25. In certain circumstances exceptions to the general rule are permitted. Thus, if a married woman having separate property, held exclusive of the *jus mariti* and right of administration of her husband, engages in trade, she may, by herself, enter into personal obligations which will bind her separate estate; but personal obligations unconnected with her separate estate will not bind her.[1]

2. Trade obligations. If wife living separate from husband, etc.

If again a wife is living separate from her husband and is engaged in trade, her personal obligation will be good against both her person and estate.[2] This was decided at a very early date where a wife was "carrying on an hostelrie";[3] in another case where she was a vintner;[4] and in a third where she kept a lodging-house.[5] The principle is that as the wife is separate from her husband she cannot have his advice and assistance; she must act as an independent person, and so the law treats her for the time being as *sui juris*.

But otherwise if wife not in trade.

If, however, a wife living separate from her husband is not engaged in trade her inability continues. Thus the personal bond of a married woman in this situation for aliment to her own son, who complained that he was troubled "by a bulimy and the appetite of a mastiff (*appetitus caninus*)," was found not to be enforceable against her; but the Lords in this case "recommended to her to furnish her son *ex pietate materna* (for *venter non habet aures nec patitur moram*), what she could spare." This, the reporter is careful to add, "was a caution of moral equity, but of no legal compulsion."[6]

[1] Biggart *v.* City of Glasgow Bank, 15 Jan. 1879, 6 R. 470.

[2] Churnside *v.* Currie, 1789, M. 6082, followed and approved in Orme *v.* Diffors, 30 Nov. 1833, 12 S. 149; Ritchie *v.* Barclay, 5 June, 1845, 7 D. 819; Bell, *Pr.* § 1612.

[3] Hog *v.* Little, 1611, M. 5955.

[4] Russel *v.* Paterson, 1629, M. 5955.

[5] Hay *v.* Corstorphin, 1663, M. 5956.

[6] Bailie *v.* Lady Lethem, 1680, M. 5998, 5981: Fountainhall, i. p. 102.

§ 26. If the *jus mariti* and right of administration are excluded a married woman can contract or incur debt in respect of her property as if she were unmarried. The only difference is that she does not oblige herself personally. Whenever, therefore, a married woman can contract debt so as to bind her separate estate it follows that she can be made bankrupt and her estate sequestrated, and it does not matter whether she is engaged in trade or not, or whether the debt has been incurred during marriage or was ante-nuptial.[1]

3. Obligations in respect of separate estate.

§ 27. If a married woman grants an obligation *ad factum praestandum*, *e.g.* to enter vassals, to deliver articles in her possession, to exhibit titles, to dispone heritage, and generally to perform facts which are in her own power, and cannot validly be performed but by herself, she will be compelled to implement it. In such cases personal diligence may be used against her, and she is liable to imprisonment in the event of non-implement.[2]

4. Obligations *ad factum praestandum*.

[1] 2 Bell, *Com.* 167 (5th ed.), 157 (7th ed.). Formerly there was a difficulty in rendering a married woman notour bankrupt, but this was removed by the Bankruptcy Act of 1856, § 13, and by the same Act the distinction between traders and non-traders was abolished.

Sequestration of the estates of married women frequently takes place, as may be seen by an examination of the files of the *Edinburgh Gazette*.

Cessio is now likewise competent. Davidson *v.* Rae, March, 1885, 1 Sh. Co. Rep. 147 ; Mackenzie, *Law of Cessio*, p. 10. There must be intimation of the proceedings to the husband.

[2] Stair, 1. 4. 14 ; Ersk. 1. 6. 19. Tait *v.* Wilson, 4 June, 1831, 9 S. 680. Here a married woman was imprisoned for 30 days for refusing to sign a receipt for legitim ; but the Court indicated that it was incompetent as the husband's receipt was all that was required.

CHAPTER III.

THE DISPOSITION OF THE PROPERTY OF MARRIED PERSONS WHICH THE COMMON LAW MAKES UPON THE DISSOLUTION OF THE MARRIAGE BY THE DEATH OF EITHER SPOUSE.

Usus under Roman law.

§ **28.** According to the Roman custom of *usus* a woman passed under the *manus* of her husband if she lived continuously with him as his wife for a year. She was, says Gaius,[1] usucapted, as it were, by a year's possession, and so passed into her husband's family and acquired in it the position of a daughter. This *usus* was thus simply the ordinary prescription. When a Roman citizen had possession of anything, except land, for a year, he attained the full rights of ownership.

House Community in certain parts of France.

Something similar to this prescription existed down to a very recent date, as an incident of certain base tenures, in some districts in France in which traces of the House Community prevailed. Under that arrangement community was produced between two or more persons by their merely living together "*a un pain et a un pot*" for a year and a day. If any one was allowed to become an inmate of a household and continued therein for that period, the whole *moveable* property of the persons thus brought together was merged in one fund. Thus, a son-in-law or daughter-in-law who came to dwell with their father-in-law

[1] Gaius, *Institutes*, i. 111.

or mother-in-law acquired community of goods with them at the end of a year and day, if there was not an agreement to the contrary.[1]

Origin of *communio bonorum* between husband and wife.

§ 29. It has been suggested that the *communio bonorum* between husband and wife had an origin similar to that of community of goods under this local custom. This, however, is a subject that would require further investigation. Whatever may have been the foundation of *communio bonorum inter virum et uxorem*, it is the case that in certain provinces of France and in some parts of Germany it did not become effectual until a year and day after the marriage.[2] Such, too, was the law of Scotland. While this may have originated in a rule requiring a certain period to produce community,[3] it would rather appear that it arose out of the ancient forms of contracting marriage.

Lapse of year between the two parts of marriage.

§ 30. When in old times marriage consisted of two parts, the wedding and the giving away, the practice was that the latter took place within year and day of the former. The intervening time was a period of probation, and until the giving away the contract was not complete and either party could withdraw on forfeiting whatever gifts he or she had received. This bears a close resemblance to the Roman *usus*, and a common custom may underlie both. If the woman became a mother in the interim her child was legitimate. The betrothal was known amongst the Scandinavians as

[1] Laboulaye, *Recherches*, p. 333; Maine, *Early Law and Custom*, p. 237.

[2] Laboulaye, *Recherches*, pp. 335, 373; Pothier, *Traité de la Communauté*, § 5, Œuvres, t. vii. p. 58. Both refer to the *Coutumes* of Bretagne, 421, 446, 448; of Anjou, 511; of Maine, 508; and of Grande-Perche, 102; Grand Coutumier, ii. c. 40.

[3] Something similar prevailed in the old Burgh Laws of Scotland. Possession of land in a burgh for a year and day gave a good title. *Leges Burgorum*, c. 10, ed. Innes.

Custom of handfasting.

festar or fastening;[1] and in Scotland the name *handfasting*[2] was given to a somewhat similar ceremony which was in use until a comparatively recent date. Under this custom the engagement lasted for a year, and if each party continued constant the hand-fasting was renewed for life, but if either dissented the engagement was void, and both were at full liberty to make a new choice, with this proviso, that the inconstant was to take charge of the offspring of the year of probation.[3] The old term was long used to describe the betrothal as distinguished from the subsequent marriage. Thus, says a chronicler of the year 1571:—John Lord Maxwell who "was contractit in marriage with ane sister of Archibald Erle of Angus and Mortoune, had maid provisioun for a bancat to be maid in Dalkeyth, for the feasting of sum nobles and gentilmen to that hand-fasting."[4] In 1568 the Kirk Session of Aberdeen ordained that "nether the minister nor reader be present at contractis of marriage-making, as thai call thair hand-fastinis, nor mak na sic band."[5] Mr. Andrew

[1] Du Chaillu, *The Viking Age*, vol. ii. p. 5 *et seqq.*

[2] It was known in England in Shakespeare's day: "the remembrancer of her to hold the hand-fast to her lord," *Cymbeline*, i. 6. "She is fast my wife, save that we do the denunciation lack of outward order," *Measure for Measure*, i. 3. It was an old Anglo-Saxon custom. See Thrupp, *The Anglo-Saxon Home*, pp. 47, 50 (London, 1862).

[3] Pennant describes the custom as it existed in Eskdale in the seventeenth century. *Tour in Scotland*, ii. p. 91. See Robertson, *Scotland under her Early Kings*, ii. 98. The French Ambassador in Scotland wrote to King Charles IX. in 1567:—"Ilz ont coustume estrange en Angleterre, mais plus prattiquée en Escosse, de pouvoir se répudier l'un l'aultre quant ilz ne se trouvent bièn ensamble." Teulet, *Papiers d'Etat relatifs à l Histoire de l'Ecosse*, t. ii. p. 157, quoted Robertson, *Statuta Ecclesiae Scoticanae*, vol. ii. p. 297.

[4] *Historie of King James the Sext*, p. 98 (Edinburgh, 1825, 4to).

[5] Selections from he Records of the Kirk Session of Aberdeen, p. 14 (Spalding Club).

Cant in a sermon at Glasgow, in 1638, pressing the people to take the Covenant, said, "that he was sent to them with a commission from Christ, to bid them subscribe the Covenant, which is Christ's contract, and that he himself was come a wooer to them from the bridegroom, and called upon them to come and be hand-fasted unto Christ by subscribing the contract."[1] "Every soul," says the Rev. James Fergusson of Kilwinning, "is, when the Father draweth it to Christ, contracted and hand-fasted with him."[2]

Communio bonorum emerged when marriage perfected.

§ 31. Hand-fasting ceased to be a custom binding in law prior to the sixteenth century, but even so late as that time it was of considerable force.[3] If then marriage only became

[1] *The Spirit of Popery speaking out of the Mouths of Phanatical-Protestants; or, the Last Speeches of Mr. John Kid and Mr. John King, two Presbyterian Ministers* . . . by an Orthodox Protestant, p. 7 (London, 1680, *fol.*). Dalyell (*Darker Superstitions of Scotland*, p. 291) gives a similar passage from John Kid's speech, but there is no such passage either in the above edition or in the quarto edition of 1680. Neither is it in Wodrow's version. On a copy of the quarto edition, which I have, a contemporary has written, "The Fanatick teachers in London can easily make Scotch speeches, with never a Scotch word in them." The suggestion evidently is that the speeches were written in London.

[2] *Exposition of the Epistles to the Galatians and Ephesians.* (Edinburgh, 1659).

[3] Handfasting seems gradually to have extended to a longer period than a year, and to have become merely a promise to marry. In 1562 the kirk session of Aberdeen ordained "Becaus syndrie and many within this toun ar handfast, as thai call it, and maid promeis of mariage a lang space bygane, sum seven yeir, sum sex yeir, sum langer, sum schorter, and as yit vill nocht mary and compleit that honorable band nother for fear of God nor luff of thair party . . . that all sic personis as hes promeist mariage faythfully to compleit the samen betuix this and Fasteranis Evin nixt cummis." Selections from the Records of the Kirk Session . . . of Aberdeen, p. 11 (Spalding Club). By the "Statutes of Icolmkill" made by the Bishop of the Isles in 1609, under a special commission from the King and Privy Council of Scotland, "marriageis contractit for certeine yeiris" are "simpliciter dischargeit." *Collectanea de Rebus Albanicis*, p. 119 (Iona Club, 1847).

perfect at the end of a year it is easy to see that *communio bonorum* could only take effect as from the date of complete marriage, and the practice of hand-fasting in Scotland seems to explain this apparent peculiarity.

Result of dissolution of marriage within year and day.

§ 32. The law was, that if the marriage was dissolved by the death of either spouse within year and day without the birth of a child, it was not considered as a permanent marriage, and there was as far as possible *restitutio in integrum* upon both sides. All rights granted in consideration of the marriage became void, and things returned to the condition in which they stood before the marriage; the tocher returned to the wife or those from whom it came;[1] and all the interest, either legal or conventional, arising to the wife in the husband's estate returned to the husband or his heirs; or, as put by Professor Forbes "all things done in contemplation thereof on either side, blow up, become void, and return to the same condition they were in before the marriage."[2] Hence in marriage contracts it was the practice to provide that the arrangements thereby made were not to be affected by the death of either party within year and day.[3] When Queen Mary was married to the Dauphin of France the contract provided that she should "joyra de ses droicts et assignaulx soit quil y ait enfans ou non."[4]

[1] For examples of claims for repayment of tocher, see Hector, *Judicial Records of Renfrewshire*, i. p. 44, ii. 183.

[2] *Institutes of the Law of Scotland*, i. p. 67. See Balfour, *Practicks*, pp. 100, 112; Stair 1. 4. 19.

[3] "It being uncivil," as we are told by an old writer, "to suppose such a thing, so as in the body of the contract to provide against it, a Bond or Writ apart to this effect is more proper." Spotiswood, *Introduction to the Stile of Writs*, p. 203 (Edinburgh, 1708).

[4] *Acts of the Parliament of Scotland*, ii. p. 512, a. The contract provided that they should be "vngs et communs . . . en tous biens

§ 33. This rule was abolished by statute in 1855, and is now only of antiquarian interest.[1] Abolition of old rule.

Division of the Conjugal Property.

§ 34. Upon the dissolution of a marriage under the old law, after the lapse of year and day, or within that time if a child had been born, a certain division of property took place. Under the present law a similar but not identical division takes place, irrespective of when the dissolution occurs. Division of conjugal property upon dissolution of marriage.

Moveable Estate.

§ 35. (*a*). If the wife predeceased her husband a certain portion nominally of the goods in communion, but in reality of the husband's moveable estate, fell to her testamentary disponees if she died testate, or to her next of kin if she died intestate. This was known as the wife's share of the goods in communion. Its amount depended upon whether at the date of her death there were surviving children of the husband by that or any former marriage. If there were such children the wife's share of moveables was one third. If there were no such children it was one half. Predecease of wife: Wife's share of goods in communion.

If the wife died intestate her children by that or any former marriage were of course her next of kin and took accordingly. If she had no children then her other next of kin succeeded as if she had never been married. Children, Succession.

et choses esquelles communaulte peult estre et escheoir par les loys et statutz de France."

[1] 18 Vict. c. 23 § 7. Appendix, p. 181. Notwithstanding this enactment, marriage contracts made for many years afterwards contained the old clause. Conveyancers evidently distrusted the protection of the Act; just as now the husband's *jus mariti* is excluded in such deeds as if the Married Women's Property Act did not exist.

by the common law of Scotland, have no claim against their mother's estate, so that the wife had absolute power of disposal of this portion of the goods in communion, and could disinherit them if she liked.

The wife's share of the goods in communion was on her death in the same position as separate estate, and passed as entirely away from the husband in the case of her intestacy, as if it had belonged to her before marriage, or as if she had succeeded to it from her father.

Hardship.

If the result of *jus mariti* operated hardly upon the wife, the effect of her death upon the husband's estate was often highly prejudicial. Although she had brought no property to him and contributed nothing but liability for her ante-nuptial debts, one half of all that he possessed might suddenly pass to his children or step-children or to his wife's relatives whom he had never seen or to some Institution of which he disapproved.

This is no longer law, having been abolished in 1855.[1] In 1644 an exemption had been made in favour of ministers' libraries,[2] but the Act was rescinded at the Restoration.

Predecease of husband.

§ 36. (*b*). If the husband died first, leaving a widow and a child or children by that or any former marriage of his, his free moveable estate suffered a tripartite division; one third—the *pars rationabilis* of the English law—belonged to the

Jus relictae. widow, termed her *jus relictae;* one third belonged to the

Legitim. children as *legitim* or *bairn's part of gear*, even though such children were of a former marriage; the remaining one third

Dead's part. was known as *dead's part*—in England, deadman's part—and was subject to the testamentary disposition of the husband, or, if he made none, it fell to his next of kin, who, of course, were his children. All therefore of his moveable

[1] 18 Vict. c. 23 § 6. Appendix, p. 181. [2] Act 1644, c. 19.

estate that a man could dispose of, if survived by wife and children, was one third.

§ **37.** (*c*). If the husband left a widow but no children, the division was, and is, bipartite: one half being *jus relictae*, and the other half dead's part. Widow and no children.

§ **38.** (*d*). If the wife predeceased, and the husband was survived by a child or children, the division on his death was, and is, bipartite, one half being legitim and the other half dead's part. Children and no widow.

§ **39.** The rules stated in paragraphs (*b*), (*c*), and (*d*) are still the law, and have been the law of Scotland from the earliest times, and were at one time the law of England. They apply only in the case of Scotch succession, that is, when the husband was domiciled in Scotland at the time of his death. If he was domiciled elsewhere, the succession to his moveable estate will be regulated by the law of the place.[1] Present law.

§ **40.** "When anyone being indisposed wishes to make a will, if he be not involved in debt, all his moveables should be divided into three equal parts: of which one belongs to the heir, another to his wife, and the third is reserved to himself. Of this third he has the free power of disposing: but if he dies without leaving a wife, the half is reserved to him." This is the law as stated by Ranulf de Glanvil,[2] the oldest writer on English law, and whose work is the founda- Oldest statement of the law by Glanvil.

[1] Nisbett *v.* Nisbett's Trustees, 24 Feb. 1835, 13 S. 517; Newlands *v.* Chalmers' Trustees, 22 Nov. 1832, 11 S. 65; Kennedy *v.* Bell, 2 Feb. 1864, 2 M. 587. *Infra*, p. 200.

[2] *De Legibus et Consuetudinibus Angliae*, vii. c. 5. The germ of the statement appears in the Secular Dooms of Canute, c. 71 (*Ancient Laws and Institutes of England*, vol. i. p. 413; Stubbs' *Select Charters*, p. 74, ed. 1884). By the laws ascribed to Henry I. (lxx. 22), a widow was entitled to her dower and dowry (*dos et maritacio*), her Morning-gift, and one-third of the conquest (*de omni collaboracione sua preter*

tion of the well-known *Regiam Majestatem*. The text of this passage in the two treatises is identical in certain MSS.[1] In some of those of the *Regiam* "children"[2] is substituted for "heir," which makes the law exactly what it now is. It is curious that while in England Glanvil's work is accepted as of the highest value, in Scotland the *Regiam Majestatem* is not what is technically known as an "authority," and has been by some regarded as little short of a forgery, yet it accurately states the law of Scotland in many particulars. In the present case Glanvil's rule ceased to be the general law of England shortly after he wrote, although it remained in force in various parts of that country until a recent date. Without entering upon a discussion of that *quaestio vexata*, the origin of the *Regiam Majestatem*, it may be remarked, in passing, that Glanvil's treatise, at one time, fairly represented the law of Scotland. It seems to have been revised by a scholiast of the thirteenth century to bring it down to his own date, and into harmony with the special customs of Scotland, where it became known as *Regiam Majestatem*. This was probably again revised in the next century, and was then accepted as of authority,[3] but was not subsequently

Rule of the *Regiam Majestatem*.

Genesis of the *Regiam Majestatem*.

vestes et lectum suum) *Ancient Laws and Institutes of England*, vol. i. p. 575. This is almost a reproduction of the laws of the Ripuarian Franks, tit. 37. See *infra*, p. 35. She had in addition under the latter 50 solidi of dowry and her Morning-gift.

[1] See *Regiam Majestatem*, ii. c. 37 (ed. Skene), c. 30 (ed. Innes), Acts of the Parliaments of Scotland, i. p. 615.

[2] Skene's translation reads "bairns." In the Burgh laws it is "the third parte of all the gudes and geir perteines to the sonnes and dochters lawfully begotten."

[3] This was Lord Hailes' opinion: "Supposing *Regiam Majestatem* to have been copied from Glanville, where-ever its tenor is similar to that of *Regiam Potestatem*, this will derogate from the antiquity, but not from the authority of *Regiam Majestatem*.

"The Scottish legislature might imperceptibly adopt the composition of a private man, drawn up from the law of England, as the whole

re-edited, and became to a considerable extent obsolete, and was neglected, although nominally retained as one of "the bukis of law of this Realm."

We are not in the present case dependent upon the *Regiam Majestatem* for the old law of Scotland, as it is substantially found in two admittedly authentic documents, the Leges Burgorum [1] and certain fragments of Ancient Laws.[2]

Origin of *jus relictae* and of legitim.

§ **41.** *Jus relictae* had its origin in the old German customs, probably influenced by Roman law.[3] Legitim, on the other hand, appears to have had its foundation directly in the jurisprudence of Rome, which very jealously guarded the rights of children. They had an action *querela inofficiosi testamenti* for reduction of the undutiful testament, as it was termed, if they were not remembered to the extent required by law. So binding was its obligation regarded that one who violated the "*officium pietatis*" was looked upon as if he had been of unsound mind, *color insaniae.*

Jus relictae and legitim cannot be defeated.

§ **42.** *Jus relictae* and legitim belong absolutely to widow and children respectively, and cannot be disappointed except by ante-nuptial contract, or by special discharge. Both vest

Christian world adopted the decretals of Gratian." *Additional case of the Countess of Sutherland*, chap. i. p. 2. See also *ib.* p. 24.

Keeping out of view the references to statutes, the alterations upon the text of Glanvil indicate approximately the date of the *Regiam.* Judging from these it would appear that it assumed its present form at a comparatively early date. Little, if any, use has been made in it of later English authors; it would seem as if the adapter of Glanvil was ignorant of Bracton, Britton, and Fleta.

[1] C. 115 (p. 55, ed. Burgh Records Society).

[2] C. 21 (*ib.* p. 170).

[3] The laws of the Ripuarian Franks gave the wife one third of the "conquest" of the marriage. Leges Ripuariorum, tit. 37; Walter, *Corpus Iuris Germanici Antiqui*, vol. i. p. 175. See also *The Capitularies*, iv. 9; *ib.* vol. ii. p. 470. The Ripuarian is to a large extent a reproduction of the Salic law. Both are followed in the *Leges Henrici Primi.*

by mere survivance without confirmation, and widow and children take as creditors not as successors;[1] probably upon the ground that the title accrued during the lifetime of the husband and father and became complete upon his death.[2] The doctrine of *communio bonorum* explains the nature of the claim for *jus relictae* and legitim, but then it is contended, as has been already pointed out,[3] that *communio bonorum*[4] never really did exist, but was reared up merely to explain those very claims.

Married woman's legitim passes to husband; but she may elect to take substituted conventional provision.

§ **43.** Whatever a married woman took as legitim, or as one of the next of kin of her father or mother, or as a legatee, passed at once to her husband in virtue of his *jus mariti*, and from him to his creditors if he was insolvent.[5] If a married woman had the right to elect between legitim and a conventional provision, she was however entitled, without her husband's consent, and against the wishes of his creditors, to elect to take the latter, even although the *jus mariti* was excluded from it.[6] This is still the law; but now[7] neither legitim nor provision vests in the husband *ipso jure*, although he must consent to the declaration of election.

[1] Fisher *v.* Dixon, 16 June, 1840, 2 D. 1121, affd. H. L. 1843, 2 Bell App. Ca. 63; Fisher *v.* Dixon, 6 July, 1841, 3 D. 1181.

[2] See per Lord Moncrieff in Stevenson *v.* Hamilton, 7 Dec. 1838, 1 D. 196. This is the principle suggested in England as regards the husband's curtesy. Co. Litt. 30 a.

[3] *Supra*, § 7.

[4] The *Leges Henrici Primi* seem to assume a community between husband and wife, "If a woman die without children, let her parents divide her share with her husband." lxx. 23.

[5] Macdougal *v.* Wilson, 20 Feb. 1858, 20 D. 658.

[6] Miller *v.* Birrell, 8 Nov. 1876, 4 R. 87; Learmonth *v.* Miller, 1875, L. R. 2 Sc. App. 438; Stevenson *v.* Hamilton, 7 Dec. 1838, 1 D. 181; Lowson *v.* Young, 15 July, 1854, 16 D. 1098; Macdougal *v.* Wilson, *supra*.

[7] *Infra*, §§ 89, 101, 104, 175.

No succession between husband and wife.

§ 44. It is to be borne in mind that by the law of Scotland there is no succession by affinity; husband and wife never succeed to each other, and in no sense can the wife be termed one of the heirs of the husband or the husband one of the heirs of the wife,[1] nor can the relatives of the one succeed to those of the other. Thus what a widow takes *jure relictae* passes on her death, failing children, to her own next of kin as if her husband had never existed. Similarly what remains with the husband, after satisfaction of the wife's claims, passes to his own relations, to the entire exclusion of those of his wife.

Wife's separate estate passes to her own next of kin.

§ 45. If by convention the *jus mariti* is excluded and the wife's property remains as a separate estate in her person, or is vested in trustees for her behoof, it passes on her death to her next of kin, to the absolute exclusion of the husband.[2]

The recent statute which excludes *jus mariti* provides for this case, as will be afterwards mentioned.

If there are children they, of course, are the nearest in blood of father and mother respectively, and take accordingly, but failing children the nearest of kin of the deceased spouse, however remote the relationship, will take, and if no relative can be traced the Crown will succeed as *ultimus haeres*, to the entire exclusion of the surviving spouse.[3] The later law of Rome was more favourable to the wife, for it allowed her to come in preferably to the Treasury, but still only after all the kith and kin of the husband.[4]

[1] Inglis *v.* Inglis, 28 Jan. 1869, 7 M. 435; Smith *v.* Brown, 18 July, 1890.

[2] See Bertram's Trustees *v.* Matheson's Trustee, 10 March, 1888, 15 R. 572.

[3] Stewart's *Answers to Dirleton's Doubts*, p. 205.

[4] In early Roman law, under which the personal position of women was not so favourable, the widow ranked as one of the next of kin of her husband. She took as *filia familiae*. See Laboulaye, *Recherches*, p. 31.

By the common law succession never ascends to the mother and her relatives. Even the mother's own estate, after vesting in her son or daughter, never ascends to the maternal line again. This was altered in 1855[1] to a certain extent as regards moveable estate, but is still the law as regards heritage.

HERITABLE ESTATE.

Marriage does not affect fee of heritable estate.

§ 46. Marriage does not affect the fee of the heritable property of either spouse. Both spouses may, subject to the liferents to be immediately mentioned, dispose of it absolutely by will. If they die intestate neither succeeds to the other, and the heritage of each, subject to these liferents, descends to his or her heir of line. The husband cannot succeed to the wife, or the wife to the husband, except under deed, that is as disponee or heir of provision. The eldest son of the marriage is the heir of line of both spouses if neither had a son by a former marriage. If there was, that son, or the eldest of such sons, will be the heir of his parent. Failing issue the succession to each spouse passes to the collateral and then to the ascending line, just as if the married pair had remained single.

Courtesy.

§ 47. As the husband, in virtue of his marital rights is entitled to the rents of his wife's heritage during the marriage, so upon her death he still enjoys the liferent of that estate if he survive. This is called his courtesy—"an gentill and favorable ordinance or constitution," says Sir John Skene.[2] It stands now as it was in his days, and

[1] 18 Vict. c. 23, § 4. Appendix, p. 180.

[2] Courtesy, or, as it is spelt in England, "curtesy," is the Latin *curialitas*, and is evidently from *curtis*. Blackstone says that the reference in this case is to *curtis*, as the court of the feudal lord whose

as it had done for centuries before, untouched by the hand of the legislator.[1]

It is subject to these conditions:—(1) That there has been a living child of the marriage—*cujus clamor auditus fuerit*, or "heard brayant," to use an old phrase;[2] (2) that there is no heir of the wife by a former marriage; (3) that the land has come to the wife by succession;[3] and (4) that she died infeft.[4] Of these rules it has been remarked by an

tenant the husband became. This explanation is not altogether satisfactory; but, after issue had, the husband alone did homage for his wife's land during her lifetime. See Coke Litt. 30 a.; 66 b.

The *mund* of a widow in certain cases under the *Leges Longobardicae* reverted to the *curtis regis*, and a wife could in certain events place herself in the *curtis regis*. Liber Papiensis [Edictum Rotharis], 182, 183, Pertz, *Monumenta Germaniæ Historica*, Leg. t. iv. pp. 333, 335; Walter, *Corpus Iuris Germanici Antiqui*, t. i. p. 714, *et seq.*

Courtesy still confers the parliamentary franchise, 2 and 3 Gul. IV., c. 64, § 8; 31 and 32 Vict., c. 48, § 14.

[1] *Regiam Majestatem*, ii. c. 53 (ed. Innes), c. 58 (ed. Skene); Glanvil, vii. c. 18. It is still in force in many of the States of the American Union. In some the rule of the common law which requires the birth of issue has been abolished, and curtesy attaches on the survivance of the husband to lands in which the wife died seized. Martindale, *Treatise on the Examination of Titles to Real Estate*, § 133 (1885).

[2] Skene, *De Verborum Significatione*, s.v. *curialitas*; Fountainhall, i. p. 207; M. 5804. It is a translation of *Regiam Majestatem*, ii. c. 58.

"Nam dicunt E. vel A. quotquot nascuntur ab Eva"

is one of the reasons alleged, Bracton, *de Legibus Angliæ*, 5. 5. 30, § 8 (Rolls Series, VI. p. 458); *A Philologicall Commentary* by E. L. [*i.e.* Edward Lisle], p. 52, London, 1652. The *Regiam Majestatem*, and Glanvil, *ut supra*, next add that the child must have been "auditum vel brayantem inter quatuor parietes." Curiously, a similar condition is found in the *Leges Alamannorum*, c. 92, which is more intelligible; the child must have been able to open its eyes and to see the roof and the four walls. Walter, *Corpus Iuris Germanici Antiqui*, i. p. 228 (Berlin, 1824).

[3] As to the case of a wife who takes by singular title but is *alioquin successura* see Watts *v.* Wilkin, 19 Nov. 1885, 13 R. 218.

[4] As to the extent of courtesy, see Lord Clinton *v.* Trefusis, 18 Dec. 1869; 8 M. 370.

eminent judge that "the maxim is directly applicable, *non omnium quæ a majoribus nostris constituta fuerunt, ratio reddi potest.*"[1]

Terce. § 48. If the wife be the survivor of the spouses she is entitled to a liferent of one third of the heritage—formerly in which the husband was infeft at the date of the marriage,[2] now in which he dies infeft, and whether acquired by succession or by singular title. This is called her Terce, or Dower,[3] as Sir James Balfour terms it, and was given,

[1] Per Inglis, L.P., in Lord Clinton *v.* Trefusis, 18 Dec. 1869, 8 M. at p. 372; Again in Watts *v.* Wilkin, *supra.*

[2] "Quhilk aucht and suld be, ane reasonable third part of all and haill the tenement of land quhilk the man or husband hes the time of the desponsatione or marriage," Skene, *De Verborum Significatione*, v. *Dos.* He founds on the *Regiam Majestatem* (ii. c. 13; Skene, c. 16), which agrees with Glanvil (vi. c. 1). See also Magna Charta, c. 7; Stubbs' *Select Charters*, p. 298. See *supra*, p. 13, note.

A Scotch contract of marriage of 1559 provides:—"Forder y^e^ said Will^m^ bindis and obleiss him, yat he sall na maner of way defraud y^e^ said Elizab^t^ of hir third of his fyve mark landis of Glanderstoun, nor nane oy^r^ landis *he is infeft in at yis present*; bot^t^ yat sche may peacebillie broik y^e^ same quhen yai sall happin to fall." Contract of Marriage between William Mure of Glanderstoun and Elizabeth Hamilton, aunt to Gavin, Commendator of Kilwinning, 3 July, 1559. *Selections from the Family Papers preserved at Caldwell*, i. p. 74 (Maitland Club).

Skene's phrase, "ane reasonable third part," is the ancient words of style: "Terce" is comparatively modern. See a lease by Jowana de Congiltoun, relict of William de Haliburtoun, of "tota sua racionabilis tercia pars" of certain lands to the Abbey of Melrose, dated 5 Feb., 144$\frac{9}{7}$, *Liber de Melros*, ii. p. 567 (Bannatyne Club). In 1678 Helen Strachan, relict of George Rankin, was served "in a just and reasonable third" of certain lands. *Collections for Aberdeen*, iv. p. 36 (Spalding Club).

[3] Terce is the *douaire* of the customary law of France, the *dower* of English laws; hence *dowager;* to be distinguished from *dowry*, the French *dot*, the Scots *tocher*. See *post*, § 113.

By the passing of the Act for the Amendment of the law of Dower (3 and 4 Wm. IV. c. 105), which came into operation on 1st January,

according to the quaint but probably not very accurate reason alleged by him, "to the effect that gif it happin hir husband to deceis befoir hir, scho may the mair easily be maryit with ane uther man."

Rules as to terce.

§ 49. To entitle her to terce the marriage must, according to the former law, have subsisted for year and day, or a living child must have been born of the marriage, but this condition does not now subsist.[1] In recent times terce was not due from burgage property, but this was contrary to the ancient practice.[2] The law was altered by statute in 1861.[3] As the law still stands it is not demandable from superiorities, from leases, or from coal, which are important exceptions; but it may be claimed from securities on land constituted by infeftment, which still remain heritable as regards all rights of courtesy and terce by the husband or wife of the creditor.[4] In England the widow was entitled to occupy the principal messuage, unless it was a castle, for forty days after her husband's death.

1834, dower can be so easily defeated as almost now to cease to exist. See Thomas, *in re* Thomas *v.* Howell, L.R., 34 Ch. D. 166. In O'Rorke *v.* O'Rorke, 1885, 17 L.R. Ir. 153, the claim was allowed.

It still prevails in many of the States of the American Union, and in buying land in America it is always necessary to see whether the vendor is married, and, if so, to obtain the consent of his wife. It must there be set off to the widow by metes and bounds, just as in Scotland she is kenned to her terce. See Martindale, *Treatise on the Examination of Titles to Real Estate*, §§ 133, 58, 44; Boone, *Manual of the Law of Real Property*, § 52 *et seqq.* (1883).

[1] The law was altered in 1855, by 18 Vict. c. 23; *Post*, § 55.

[2] This is apparent from the Leges Burgorum, cc. 23, 24. *Post*, § 69.

[3] The Conjugal Rights Amendment Act, 1861, 24 and 25 Vict. c. 86, § 11; *Post*, § 69, Appendix, p. 186.

[4] 31 and 32 Vict. c. 101, § 117. Appendix, p. 190. The old customary law of France was the same as to incorporeal rights deemed immoveable. Pothier, *Traité du Doucire*, § 22 *et seqq.*

Quarantine.

This was called her *quarantine*, and was at one time the law of Scotland.[1]

Lesser terce.

§ **50.** It may happen that a proprietor succeeds to land burdened with terce and dies before it is extinguished. In this case, if he leaves a widow, she takes only one third of the two thirds. This is called the Lesser Terce, but on the death of the first widow the right of the second is enlarged to the full third if she is then alive.

Kenning to the terce.

§ **51.** A surviving husband requires no proceedings to invest him in his courtesy. Not so a widow. To render her right effectual certain legal proceedings are required. First she must be served to her terce by a Brief from Chancery. By this her right is vested. Next, in order to give her specific possession, the property must be apportioned between the widow and the heir. This is called Kenning to the Terce. The same rule prevailed in England as regards dower.

Power of testamentary disposition as regards heritage and moveables.

§ **52.** Children, as has been explained, have no legal claim to any part of the heritable property of their parents, who can dispose of their own as each thinks proper. To use the language employed of moveable estate, it is all dead's part. If a married man—and the same now applies to a married woman—dies possessed of £20,000, of which £10,000 is invested in Railway or other Stocks and £10,000 on Bonds and Dispositions in Security, then on his death his children can claim a half or a third, as the case may be, of the Stocks and can set aside any testamentary deed disposing of them. They cannot claim any part of the Bonds, and their

[1] See the Leges Burgorum, c. 24; and cf. Statuta Alexandri, c. 22; Statuta Roberti, III. c. 20; Magna Charta, c. 7 (Stubbs' *Select Charters*, p. 298).

parent can absolutely bequeath every copper of their amount to any person or for any purpose as if the children did not exist.[1]

A shipowner's children have an absolute right to one-third or one-half, as the case may be, of all his shipping property, but if he owns land and growing timber, a loch, a coalpit, or a store, he may do with these as he pleases. The heir to a peerage has not a word to say if his father gives every acre of the family estates to the youngest son, or leaves them to trustees for clothing the Hottentots or teaching phrenology; but the father cannot bequeath his wardrobe to his valet except subject to his children's right to a share.[2]

[1] Although Bonds and Dispositions in Security are by 31 and 32 Vict. c. 101, § 117, made moveable *quoad* succession, they are not so in a question of Legitim. (See last clause of the above section of the Act), Appendix, p. 191.

[2] Although the heir has no claim if the land is put past him, he formerly had a claim as heir to a certain portion of the moveables called "heirship moveables," which could not be defeated, even although the land was settled upon another. This was abolished in 1868. 31 and 32 Vict. c. 101, § 160, Appendix, p. 193.

CHAPTER IV.

THE MODIFICATIONS WHICH HAVE BEEN MADE BY STATUTE UPON THE COMMON LAW RIGHTS OF HUSBAND AND WIFE IN RESPECT OF PROPERTY DURING THE SUBSISTENCE OF MARRIAGE AND AFTER ITS DISSOLUTION.

Statutory modification of common law.

§ **53.** The common law rights of husband, wife, and children during marriage and upon its dissolution having been stated, the statutory modifications of that law shall now be traced in the order of time.

THE INTESTATE MOVEABLE SUCCESSION ACT, 1855.[1]

§ **54.** This statute made several important changes on the common law, but for the present purpose only the following require to be noticed.

Wife's share of goods in communion abolished.

1. By § 6 the right of a predeceasing wife's representatives to a share of the goods in communion was abolished, as regards marriages dissolved after the date of the Act. If the wife died prior to that time the old rule holds.[2]

As the law now stands, therefore, the death of the wife does not affect the moveable property of the surviving husband.

Rule as to year and day abolished.

2. By sec. 7 the dissolution of a marriage before the lapse

[1] 18 Vict. c. 23, Appendix, p. 177. Popularly known as Dunlop's Act, having been carried through Parliament by Mr. Murray Dunlop, M.P. for Greenock. Since the passing of this statute it should be noted that the legal meaning of nearest-of-kin is no longer equivalent to legal heirs in *mobilibus*, Hood *v.* Murray, 1889, L.R. 14 App. Ca. 124.

[2] Kennedy *v.* Bell, 2 Feb. 1864, 2 M. 587.

of a year and day from its date by the death of one of the spouses is declared not to affect the rights of parties, but the whole rights of the survivor are to be regulated as if the marriage had subsisted for that period.

Applies to terce.

§ **55.** Although the Act was apparently intended to affect moveable estate only, this provision is so general in its terms that it covers terce. A widow therefore now takes terce whether the marriage has subsisted year and day or not. The clause does not touch the condition as to the birth of a child, and so a widower has still no courtesy unless a child of the marriage has been born alive.

THE CONJUGAL RIGHTS (SCOTLAND) AMENDMENT ACT, 1861.[1]
THE CONJUGAL RIGHTS (SCOTLAND) AMENDMENT ACT, 1874.[2]

Old law practically protected wife's moveables.

§ **56.** The *jus mariti* became law at a time when moveable property, as we now know it, did not exist. A wife's *paraphernalia* practically embraced all the corporeal moveables that a married woman was likely to possess. Her *peculium* covered any other moveable property she might have. And *paraphernalia* and *peculium* were separate estate in the person of the wife, not disposable of by her husband, not liable for his debts, and not subject to the diligence of his creditors. Wealth consisted solely in land. The *corpus* of a wife's land was protected against the husband; but her possession was his possession, and he took the produce as his wife's administrator, and the arrangement was probably reasonable in early times. When other forms of wealth grew up, and ready money increased, the only form of investment known was the lending of it upon the security of land, and the law regarded all such loans as of the nature of land, and heritable. Thus, if they had been made by the

Certain investments made heritable and so protected *quoad* the *corpus*.

[1] 24 and 25 Vict. c. 86, Appendix, p. 182. [2] 37 and 38 Vict. c. 31.

wife, they remained her property; if they had been made by the husband they were not liable to terce, unless constituted by infeftment. So too by an ingenious fiction permanent loans on personal security were likened to land, and bonds bearing interest or having *tractus futuri temporis* became *feuda pecuniae*, and when a wife had such investments they remained her own.

Growth of moveable property outside protective limits.

§ 57. The growth of industrialism during the last and the present centuries created a vast amount of wealth, and of new forms of investment, which the old rules could not protect, but which in virtue of the *jus mariti* became the husband's property. The prevailing use of marriage contracts for the protection of this property when it belonged or might fall to married women, and the cases of hardship which occurred both in England and in Scotland where there was no contract, showed that some alteration upon the law was necessary. The matter was taken up by the Law Amendment Society, and after having been discussed for many months, an exhaustive and instructive report was issued advocating a change of the law. Following upon this, public agitation commenced and over 70 petitions, complaining of the state of the law, were presented to Parliament in the session of 1856. One of these was signed by upwards of 3,000 women, amongst whom were Elizabeth Barrett Browning, Mrs. Carlyle, Mary Cowden Clarke, Amelia B. Edwards, Mary Howitt, Mrs. Gaskell, Harriet Martineau, and many others distinguished in literature and art.[1]

Hardship.

Motion in House of Commons, 1856.

§ 58. Sir Erskine Perry, who is understood to have drafted the Report of the Law Amendment Society, moved in the House of Commons, on 10th June, 1856, that the rules of

[1] The petition is printed in *The Jurist* (N.S.) 1856, vol. ii. part ii. p. 134.

the common law which give all the personal property of a woman on marriage, and all subsequently acquired property and earnings to the husband, are unjust in principle and injurious in their operation. The motion was seconded by Lord Stanley, now the Earl of Derby, and was supported by the Attorney-General, Sir Alexander Cockburn. It was opposed by the Solicitor-General, Sir Richard Bethell, and by Mr., afterwards Sir Richard Malins, but on the whole it met with general approval. This discussion answered the immediate purpose of Sir Edward Perry, and the motion was accordingly withdrawn without a division.

Lord Brougham's Bill.

§ 59. At the beginning of next session, 13th February, 1857, Lord Brougham, in a long and interesting speech, moved certain resolutions in the House of Lords upon the same subject, and presented a Bill "to amend the Law with respect to the property of Married Women." The debate on the resolutions was adjourned, and the Bill dropped in consequence of Lord Brougham's being obliged to go abroad. In May of the same year Sir Erskine Perry obtained leave from the House of Commons to bring in a similar Bill. It was approved of by the Government draftsman, and was very much the same as Lord Brougham's. On 15th July the second reading was carried by a majority of 55. Nothing further, however, could be done in that session, and the subject was not revived for many years afterwards.

Sir E. Perry's Bill.

Divorce and Matrimonial Act.

§ 60. While the Married Women's Property Bill was under discussion, Lord Cranworth's well-known Divorce and Matrimonial Act was before Parliament, and the opportunity was taken of altering the law of England as regards the property of married women, particularly when the marriage was dissolved or practically dissolved.

Conjugal Rights Act for Scotland.

§ 61. In 1861 followed the Conjugal Rights (Scotland)

Amendment Act, which applied solely to Scotland. The principal provisions of this statute relative to the present subject are these:—

1. Protection order for wife deserted by her husband.

§ 62. A wife deserted [1] by her husband may (sec. 1) obtain from the Court of Session an Order protecting against him and all creditors or persons claiming under or through him all property falling under the *jus mariti* (sec. 19) which

(*a*) she has acquired, or may acquire by her own industry [2] after such desertion, and

(*b*) property to which she has succeeded, or may succeed to, or acquire right to after such desertion.

After intimation of the Order, as required by the statute, the above property belongs to the wife as if she were unmarried (sec. 4), except

(i.) property which the husband or his assignee or disponee has, before proceedings were begun in court, obtained full and complete lawful possession of; and

(ii.) property which has been attached by arrestment followed by a decree of furthcoming, or by a poinding and sale reported before the date of presenting the petition for the Order.

So long as the Order stands, the wife (secs. 5 and 6) may sue and be sued as if unmarried.

By an Act passed in 1874 [3] the Sheriff may grant the like Orders in cases coming before him.

2. Exclusion of *jus mariti* and right of administration when wife has obtained judicial separation.

§ 63. After decree of separation *a mensa et thoro* has been obtained at the instance of a wife, all property (sec. 6), which

[1] What is desertion? See Turnbull, 14 Jan. 1864, 2 M. 402; Chalmers *v.* Chalmers, 4 March, 1868, 6 M. 547. The English cases are brought together in Griffith's Married Women's Property Acts, p. 91 (5th ed. 1883); and in Stroud, *Judicial Dictionary*, s.v. (1890).

[2] That is in some lawful calling. Property acquired by immoral practices is not protected, Mason *v.* Mitchell, 3 H. & C. 528.

[3] 37 and 38 Vict. c. 31, Appendix, p. 187.

would otherwise (sec. 19) fall under the *jus mariti*, which she may acquire, or which may come to or devolve upon her, is to be held and considered as property belonging to her in reference to which the *jus mariti* and husband's right of administration are excluded. It may be disposed of by her as if she was unmarried, and on her death, in case she shall die intestate, passes "to her heirs and representatives in like manner, as if the husband had been then dead,"[1] or otherwise as she may direct by will.

Wife's position during judicial separation.

§ **64.** The wife, while so separate, is (sec. 6) capable of entering into obligations, is liable for wrongs and injuries, and is capable of suing and being sued, as if she was not married.

The husband is not liable in respect of any obligation or contract she may have entered into, or for any wrongful act or omission by her, or for any costs in any action she may sue or defend, after the date of the decree of separation and during its subsistence.

Order of protection is of same effect as decree of separation in certain respects.

§ **65.** An Order of protection duly intimated in terms of the Act is (secs. 4, 5) of the same effect as a decree of separation as regards the property, rights, and obligations of the husband and of the wife, and in regard to her capacity to sue and to be sued.

Protection under the Act subsists only so long as husband and wife remain separate.

§ **66.** The protection subsists, however, only so long as the husband and wife remain separate. If they again come together, the wife is (sec. 6) in the same position, as regards her property, as if a separation had not taken place, subject to this proviso that all property, which she has acquired in the interim,

[1] These are the same words as in the English Act (20 and 21 Vict. c. 85, § 25), and are intended to exclude a claim on the part of a surviving husband. He might have contended that his marital rights were excluded only during the subsistence of the marriage, and that they revived upon its dissolution.

is to be held to her separate use, and the *jus mariti* and right of administration of her husband is excluded therefrom.

3. Wife's equity to a settlement.

§ **67.** The statute provides (sec. 16) that when any married woman succeeds to property or acquires right to it by donation, bequest, or any other means than by the exercise of her own industry, the husband,[1] or his creditors, or any other person claiming under or through him, shall not be entitled to claim it, or if it be heritable, the rents or produce of it,[2] as falling within the *communio bonorum*, or under the *jus mariti*, or husband's right of administration, except on the condition of making therefrom a reasonable provision[3] for the support and maintenance of the wife, if she so demands. This is subject to the condition that, prior to the wife's claim being made, the husband or his disponee or assignee has not already obtained complete and lawful possession, that is, actual possession

[1] Question with husband, Clark *v.* Clark, 25 May, 1881, 8 R. 723.

[2] See Taylor *v.* Taylor, 23 June, 1871, 9 M. 893; Reid *v.* M'Walter, 1878, 5 R. 630.

[3] What is a reasonable provision? See Rust *v.* Smith, 14 Jan. 1865, 3 M. 378; Somner *v.* Somner's Trustee, 2 March, 1871, 9 M. 594; Taylor *v.* Taylor, 28 Oct. 1871, 10 M. 23; Ferguson *v.* Ferguson, 7 Nov. 1871, 10 M. 54.

The ordinary rule in the Court of Chancery is that one half of the fund will be ordered to be settled, and the other half will be allowed to go to the husband or his assigns, Jewson *v.* Moulson, 2 Atk. 417; Brown *v.* Clark, 3 Ves. 166. But the circumstances of each particular case will be considered, *Re* Suggitt's Trusts, L.R. 3 Ch. App. 215. Three-fourths allowed, Coster *v.* Coster, 9 Sim 597. The whole, the fund being small, *re* Kincaid's Trusts, 1 Dr. 326. The whole income, £500 a year, the husband being insolvent, Taunton *v.* Morris, 1879, L.R. 11 Ch. D. 779. So also the whole will be settled where the husband has been guilty of gross misconduct, or has abandoned the wife, or is not in a position to maintain her, and the fund is not more than sufficient for her maintenance. See Lewin upon *Trusts*, p. 743 *et seqq.* (8th edition, 1885); White and Tudor, *L.C.*, i. p. 521, *et seqq.* (6th edition, 1886).

and enjoyment of the property,[1] or that his creditors have not done effectual diligence against it.[2]

§ 68. The Act applies whether the wife succeeded to the property at or after the passing of the Act, but not in the former case if the husband was also sequestrated before the date of the Act.[3]

Act applies whether property acquired before or after its commencement.

§ 69. The principle embodied in this enactment had for long been given effect to by the Court of Chancery in England. It had its origin in the maxim that "He who seeks equity must do equity." The Scotch Courts recognized a similar principle in 1785,[4] but the case was appealed to the House of Lords and was compromised. It was conceded that such a rule could not be given effect to in Scotland, and the wife had, until 1861, no claim to any provision out of what had been her own property.

No remedy in equity in Scotland

In earlier days a similar question had arisen between the relatives of the wife, who had undertaken to provide a tocher, and the creditors of an insolvent husband. The Court at first held that the tocher was the counterpart of the husband's obligations, and that payment of it could not be demanded unless the husband or his creditors first secured the wife in the provisions stipulated for from the husband; but subsequently this rule was abandoned on the ground that the marriage itself was consideration for the tocher. As pointed out by Lord Mac-

[1] This is the interpretation put upon the statute in Somner *v.* Somner's Trustee, *supra;* Clark *v.* Clark, 25 May 1881, 8 R. 723. See, per Fry, J., in Nicholson *v.* Drury, L.R., 7 Ch. D. at p. 55.

[2] As to this provision see Miller *v.* Learmonth, 21 Nov. 1871, 10 M. 107; Jack *v.* Ferguson, 5 Feb. 1878, 5 R. 624; Reid *v.* M'Walter, *supra.*

[3] Taylor *v.* Taylor, 28 Oct. 1871, 10 M. 23; Learmonth *v.* Miller, L.R. 2 Sc. App. 438.

[4] Lisk *v.* Lisk, M. 5887. This was practically overruled in 1794 by Robb *v.* Robb's creditors, M. 5900. See Stevenson *v.* Hamilton, 7 Dec. 1838, 1 D. 181; Hitchcock *v.* Clendinen, 1850, 12 Beav. 534.

kenzie *primus*,[1] it is not a case of mutual contract, but if a *jus crediti* is conferred upon the husband, it vests absolutely in him, and so transmits to his creditors.[2]

Terce now demandable from burgage property.

§ **70.** At common law terce is not due from burgage property.[3] This is altered by sec. 12 of the Act of 1861, and now the widow of any person who dies infeft in property held by burgage tenure is entitled to terce therefrom.

Courtesy has always been due from burgage as from other heritage.

This Act not superseded by subsequent legislation.

§ **71.** The enactments of the Conjugal Rights Act, as regards earnings and the wife's equity to a settlement, have been, to a considerable extent, superseded by subsequent legislation, but the protection afforded by that statute to these earnings and to the property of a married woman who has obtained judicial separation or an order of protection, is more complete, and the wife's position more independent than under the later Acts, which relate solely to marriages subsisting in their integrity. Not only is the property of a wife who has obtained a Protection Order or a Decree of Separation protected, but the husband's *jus mariti* and right of administration are excluded. She is, as regards her property, as if she were unmarried. She can also enter into obligations, make contracts, sue and be sued, as if she were a spinster or a widow.

The Married Women's Property Act.[4]

English Married Women's Property Act, 1870.

§ **72.** The movement for the further protection of the property of married women gathered force in England; and,

[1] Boswell *v.* Miller, 4 Feb. 1846, 8 D. at p. 438.

[2] Lawson *v.* Maxwell, 1803, 4 Pa. App. 464.

[3] *Supra*, § 49. The old law was not so wide. The *Leges Burgorum* only provide (c. 106, ed. Innes, c. 110, ed. Skene) that a man may not dower his wife with the principal messuage if he has other property. See also c. 24, ed. Innes, c. 25, ed. Skene.

[4] 33 and 34 Vict. c. 93.

in 1869 a Bill to amend the law was brought in, in the House of Commons, by Mr. Russell Gurney, but did not pass. It was almost identical with those of Lord Brougham and Sir Erskine Perry of twelve years before. Next session Mr. Russell Gurney and his friends brought in another Bill upon somewhat different lines, and were successful in carrying it through Parliament.

In 1874 an Act[1] was passed to amend the Married Women's Property Act.

Rules of equity made applicable in England in all cases.

§ **73.** One of the arguments used by the opponents of the various Bills was that, whatever the common law might be, the rules of the Courts of Equity gave ample protection. This was not admitted upon the other side, and the course of legislation proves that the argument was fallacious; but the protection afforded in equity—and it was considerable[2]—was, in 1873, made, as regards England, the law all round, the Judicature Act[3] having provided that when there was any conflict or variance between the rules of equity and the rules of common law, the rules of equity were to prevail.

Principle of English Act adopted in Scotland.

§ **74.** The principle of the Married Women's Property Acts was borrowed from the legislation of the United States of America. Scotland in turn borrowed from England, and in 1877 the Married Women's Property (Scotland) Act, 1877, was placed upon the Statute book. It is merely a clumsy adaptation of parts of the English Acts, while these Acts are not nearly so neat or so well drawn as the Bills of 1857 or 1869.

[1] 37 and 38 Vict. c. 50.

[2] *Supra*, § 3.

[3] 36 and 37 Vict. c. 66, § 25, sub-sec. ii. As to its effect on the common law remedies of a married woman, see *In re* Crawford Crawford *v.* May, 63 L.T. 395; 6 *The Times*, L.R. 461.

THE MARRIED WOMEN'S PROPERTY (SCOTLAND) ACT, 1877.[1]

Preamble.

§ 75. This statute sets out with the somewhat grudging preamble that "it is just and expedient to protect,[2] to the extent hereinafter provided for, the property of married women in Scotland."

Jus mariti and right of administration excluded from

By sec. 3 the *jus mariti* and right of administration of the husband are excluded—

(1) Wages and earnings;

(1) From the wages and earnings of any married woman acquired or gained by her after 1st January, 1878,

(*a*) in any employment, occupation, or trade in which she is engaged, or

(*b*) in any business which she carries on under her own name;

(2) From property acquired by wife's literary, etc., skill.

(2) From any money or property acquired by her after that date through the exercise of any literary, artistic, or scientific skill.

Wages, etc., to be deemed settled for her separate use.

Such wages, earnings, money, or property, and all investments thereof, shall be deemed to be settled to her sole and separate use,[3] and her receipts[4] shall be a good discharge for such wages, earnings, money, or property, and investments thereof.[5] These last words, "and investments

[1] 40 and 41 Vict. c. 29, Appendix, p. 193.

[2] In Rust *v.* Smith, 14 Jan. 1865, 3 M. 378, the Court, prior to the recent legislation, practically protected a wife's earnings.

[3] An English expression; also used in the Conjugal Rights (Scotland) Act, § 6. *Infra*, pp. 82 and 186, note [4]. The Court of Chancery, says James, L.J., invented that blessed word and thing, "the separate use of a married woman," Ashworth *v.* Outram, L.R. 5 Ch. D. at p. 941.

[4] This was necessary, as it had been held in England that it was a bad plea to maintain that because a wife had her husband's authority to earn money, she must have thereby his authority to receive it. Offley *v.* Clay, 2 Man. and Gr. 172; cf. 26 and 27 Vict. c. 87, *infra*, p. 189.

[5] In Morrison *v.* Tawse, 18 Dec. 1888, 16 R. p. 247, the Act was field to apply to the earnings of a washerwoman living in family with her husband. His and her savings were placed in bank on deposit

thereof,"[1] are, as will be explained, of considerable importance. While the earnings are protected, the stock in trade by which they are produced is not protected, if that be the husband's property, unless it has passed by gift, express or implied, to the wife.[2] If it passed to the husband *jure mariti* prior to 1881, it can now be revested in the wife by deed under the Act of 1881. Investments protected.

This enactment extends the protection of earnings to all wives, irrespective of the date of marriage, and does not limit it, as under the Conjugal Rights Amendment Acts, to the case of a wife who has obtained a Protection Order or a Decree of Separation. These Acts are, however, (sec. 5) specially saved. Enactment applies to all wives.

§ **76.** The Act (sec. 3) specifically refers to any employment, occupation, or trade in which the married woman is engaged, or any business which she carries on under her own name."[3] The case of a wife being a trader is therefore clearly contemplated. The English Act speaks Married Woman as a trader.

receipt payable "to either or the survivor." On the death of the husband, it was held that the amount belonged one half to his representatives and the other half to the wife.

[1] The English Act, as the Scotch, declares that "investments thereof" are to be deemed settled for the separate use of the wife, but in the former the words are not repeated at the end of the clause, which does not therefore in terms give the wife power to receipt for the investments; but the rule of the English law is that personal property settled upon a feme covert for her separate use, is to be enjoyed with all its incidents; and that, as the *jus disponendi* is one of them, she may, although there is no express power of disposition given to her, dispose of it either by acts *inter vivos* or by will. White and Tudor, *L.C.*, i. p. 562 (6th ed. 1886).

[2] Ferguson's Trustee *v.* Willis, Nelson & Co., 11 Dec. 1883 11 R. 261; Henderson *v.* Henderson, 25 Oct. 1889, 17 R 18. The decision in Ferguson's case is in conflict with the English case of Ashworth (p. 56, note [2]); but the Court held that the latter turned upon a rule of the law of England which does not exist in Scotland.

See *Ex parte* Shepperd, L.R. 10 Ch. D. 573.

of a trade "which she carries on separately from her husband." These words have been left out in the Scotch Act, "thus leaving room," says Lord Fraser, "for the construction, that the earnings belong to the wife if the trade be in her own name, though she and her husband be living together; and even in England such would seem to be the law."[1] There can be no doubt that this is what is intended, but before the wife can carry on such a trade she must, while living with her husband, have his consent.[2]

While the wife is a trader in her own name and on her own account, the husband is in no way liable for the debts of the business; but if a husband takes a part in his wife's business, as by giving orders on her behalf, or selecting goods that she may have ordered, he will make himself personally liable. The business, it has been decided, is not then carried on separately from the husband within the meaning of the Act.[3] In other words, the business, in such a case, is his, not hers.

Wife in husband's employment.

It would seem that the wife may be in the employment of the husband, and be paid wages by him, which would be protected under the Act.[4]

[1] Laporte *v.* Cosstick, 23 W.R. 131; 31 L.T. (N.S. 434); Ashworth *v.* Outram, L.R. 5 Ch. D. 923.

[2] Per Inglis, L.P., in Ferguson's Trustee *v.* Willis, Nelson & Co., 11 Dec. 1883, 11 R. at p. 268; see Ashworth *v.* Outram, L.R. 5 Ch. D. 934; Tomkinson *v.* West (1875), 32 L.T. 462; White and Tudor, *L.C.*, i. p. 551 (6th ed. 1886); Chitty, *Contracts*, pp. 240, 241 (12th ed. 1890); Fraser, *Husband and Wife*, ii. 1512.

[3] See Jetley *v.* Hill, 1884, 1 Cababé & Ellis, N.P. 239. The rule of the Civil Law was "Maritus pro uxoris *obligationibus* non conveniri posse constat, nisi ipse pro ea se obnoxium fecit," C. 4. 12. 3.

[4] See Ferguson's Trustee *v.* Willis, Nelson & Co., *supra*; and Palliser *v.* Higgins, 1888, 4 Sh. Co. Rep. 323; but it is to be kept in view that it has been decided that a wife cannot enter into a personal contract, such as partnership, with her husband, even although she has separate estate, and the husband's right of administration is excluded. Macara *v.* Wilson, 15 Feb. 1848, 10 D. 708. *Infra*, § 101.

The husband, on the other hand, is not liable to third persons for his wife's trade debts unless he was her partner.[1] He may act as her agent, in which case he is not liable.

Husband's liability when wife a trustee or executor.

§ 77. If he consents to his wife undertaking an office, *e.g.*, that of trustee or executrix which involves her in responsibility, he becomes liable for the obligations incurred by her in that character if she has no separate estate.[2] If as trustee she is a shareholder in a company which goes into liquidation, both she and her husband are liable to be placed upon the list of contributories.[3]

Wife's *praepositura.*

§ 78. The wife is the husband's agent in the management of household affairs; she is *praeposita rebus domesticis*, and her husband is bound by her contracts until he determines her agency. She may be his agent in other matters, *praeposita negotiis;* but when it is sought to impose liability upon a husband for a contract made by his wife, it is for the claimant to prove the agency.[4]

Special agency.

If the husband allows her to act as his special agent, to carry on business or to make contracts, nominally for herself but really for him, he and not she is entitled to the profits,[5] and he, not her estate, is liable for her debts. Of this we had several examples in connection with the liquidation of the City of Glasgow Bank, where the husband was held liable for

[1] See *In re* Childs, L.R. 9 Ch. App. 508; Lindley on *Partnership*, p. 78 (ed. 1888).

[2] Pattisson *v.* M'Vicar, 5 Feb. 1886, 13 R. 550; see Stair, 1. 4. 17. Under the English Married Women's Property Act of 1882 the husband is not so liable, unless (§ 24) he has intermeddled in the trust or administration.

[3] Hill *v.* City of Glasgow Bank, 24 Oct. 1879, 7 R. 68; Bell *v.* City of Glasgow Bank, 1879, L.R., 4 App. Ca. 547. *Infra*, § 80.

[4] See Chitty on *Contracts*, p. 272 (12th ed. 1890); Smith *L.C.*, ii. p. 517 (9th ed. 1887).

[5] Per Lord President in Ferguson's Trustee *v.* Willis, Nelson & Co., 11 Dec. 1883, 11 R. at p. 266.

calls upon shares in his wife's name, on the ground that, excluding the question of title, the property was in him.[1]

Restriction of husband's liability for wife's debts.

§ 79. As a counterpart of the restriction of the husband's rights, it is provided (sec. 4) that in any marriage on or after 1st January, 1878, the liability of the husband for the ante-nuptial debts of his wife is limited to the value of any property received from, through, or in right of his wife, at or before or subsequent to the marriage.

This has all along been the rule as regards liability after the death of the wife, and had long ago been suggested as the fair rule in all cases, but the Courts uniformly rejected it, "for preventing embezzlement in prejudice of lawful creditors, and sopiting pleas between man and wife."[2]

The statute will only protect the husband if the marriage takes place in Scotland, or in a place where there is a similar restriction of liability. If a man marries a foreigner in her own country, and if the law there imposes general liability on a husband for his wife's ante-nuptial debts, he may be sued in this country for them.[3]

Wife's ante-nuptial debts.

§ 80. The ante-nuptial debts of a wife which used chiefly to trouble husbands were claims for maintenance, for the trousseau and the like, but with the great extension of joint stock enterprise in recent years a new danger has emerged—liability

[1] See Thomas *v.* City of Glasgow Bank, 31 Jan. 1879, 6 R. 607; Steedman *v.* City of Glasgow Bank, 31 Oct. 1879, 7 R. 111; Carmichael *v.* City of Glasgow Bank, 31 Oct. 1879, 7 R. 118.

[2] Gordon *v.* Davidson, 1708, M. 5789. It was said that "otherwise women contracting a great deal of debt, might by marriage procure themselves a protection from personal execution, and knowing their husbands would not be liable, they might easily cheat their creditors thereby, and take away their rights, whereas *jus meum mihi invito auferri non potest.*" Osborn *v.* Young, 1696, M. 5785.

[3] See De Greuchy *v.* Wills, L.R. 4 C.P.D. 362; cf. De Virte *v.* Macleod, 12 Jan. 1869, 7 M. 347.

of a husband for calls upon his wife's holdings in companies.[1] For calls he will only now be liable to the extent of any property he has received through or in right of his wife subsequent to the marriage. But if the company is wound up the case will be different. Calls on shares.

The Companies Act, 1862, provides, in reference to the winding up of companies and associations under the Act, that "if any female contributory marries, either before or after she has been placed on the list of contributories, her husband shall, during the continuance of the marriage, be liable to contribute to the assets of the Company the same sum as she would have been liable to contribute if she had not been married; and he shall be deemed to be a contributory accordingly."[2] In 1879 the Court of Session held that this enactment was repealed by implication by the Act of 1877.[3] Later in the same year a similar question arose in England when Fry, J., decided that the restriction of liability contained in the Married Women's Property Act, 1874, applied only to the wife's proper debts, of which this was not one. In his opinion the husband was himself in the position of a debtor and not merely the husband of a debtor. "He is a contributory himself, and not merely the husband of a contributory, and that liability to contribute which is made equal to a debt of his own cannot be affected by the Calls on contributories in winding up.

[1] Thomas *v.* City of Glasgow Bank, 31 Jan. 1879, 6 R. 607; Hill *v.* City of Glasgow Bank, 24 Oct. 1879, 7 R. 68; Steedman *v.* City of Glasgow Bank, 31 Oct. 1879, 7 R. 111; Carmichael *v.* City of Glasgow Bank, 31 Oct. 1879, 7 R. 118; Lindley on *Companies*, p. 42 (ed. 1889).

[2] 25 and 26 Vict. c. 89, § 78.

[3] Wishart *v.* City of Glasgow Bank, 14 March, 1879, 6 R. 823. The same decision was practically given in Biggart *v.* City of Glasgow Bank, 15 Jan. 1879, 6 R. 470; and in the later case of Forbes *v.* City of Glasgow Bank, 28 June, 1879, 6 R. 1122.

Act of 1874, which only deals with the husband's liability in respect of his wife's debts." [1] In that case the wife was possessed of certain bank shares and other property, the whole of which was, by a settlement before the marriage, assigned to a trustee upon trust for the separate use of the wife. Earlier in the year the point had been touched upon in the House of Lords in one of the City of Glasgow Bank Appeals;[2] and again came before the Court of Session when both husband and wife were placed upon the list of contributories, thus practically overruling its former judgment.[3] Neither in this case nor in that of *Wishart* was there a marriage contract, but, as appears from the English case, this makes no difference. Liability attaches to the husband because of his marital relation, not because he has been *lucratus* by the marriage.

The law has been altered, as regards England, by the Married Women's Property Act, 1882,[4] and the husband is now only liable to the extent of the property acquired through his wife. The former rule, however, still prevails in Scotland.

Transactions of wife during her nonage.

§ 81. In *Hill's* case[3] the wife endeavoured to escape liability by pleading minority at the date of the acquisition of the shares, but the Court held that as she had allowed the *quadriennium utile* to expire without challenging the transaction she could not afterwards open it up.

Husband still liable for wife's expenses in divorce suit.

The Act, it has been decided, does not affect the husband's liability for his wife's expenses in a divorce suit at his

[1] *In re* West of England Bank, *ex parte* Hatcher, L.R. 12 Ch. D. 284; see also Burlinson's Case, 3 De G. and S. 18; Sadler's Case, *ib.* 36; Luard's Case, 1 De G. F. and J., 533.

[2] Bell *v.* the City of Glasgow Bank, L.R. 4 App. Ca. 550; S.C. 6 R. (H.L.) 55.

[3] Hill *v.* City of Glasgow Bank, 24 Oct. 1879, 7 R. 68.

[4] 45 and 46 Vict. c. 75, §§ 13, 14, 15.

instance, even when she is earning wages.[1] If he is not *lucratus* by the marriage the husband is not now liable to aliment her relatives.[2]

But not for aliment of her relatives.

§ 82. It is provided (sec. 4) that any Court in which a husband shall be sued for an ante-nuptial debt of his wife shall have power to direct any inquiry or proceedings which it may think proper for the purpose of ascertaining the nature, amount, and value of any property acquired by him through her, and in respect of which he is liable under the Act.

Inquiry as to property acquired by husband through wife.

Married Women's Policies of Assurance (Scotland) Act, 1880.[3]

§ 83. At common law in Scotland a wife has an insurable interest in the life of her husband, and a husband in the life of his wife.[4] In England there is an insurable interest in neither case. This was remedied as regards insurance by a wife, in 1870, by the Married Women's Property Act of that year;[5] and in 1880 a corresponding provision was made for this country by the Married Women's Policies of Assurance (Scotland) Act, 1880, but the case of insurance of the life of a wife by her husband still stands on the common law. The Act provides:—

Former difficulty as to wife insuring husband's life.

[1] Milne *v.* Milne, 8 Dec. 1885, 13 R. 304. See Harrison *v.* Harrison, L.R. 13, P.D. 180.

[2] M'Allan *v.* Alexander, 7 July, 1888, 15 R. 863. *Supra*, § 22.

[3] 43 and 44 Vict. c. 26. Appendix, p. 195.

[4] See Wight *v.* Brown, 27 Jan. 1849, 11 D. 459; Craig *v.* Galloway, 1861, 4 M'Q. 267; 16 and 17 Vict. c. 34, § 54.

[5] The existing provision in England is § 11 of the Married Women's Property Act, 1882, which in terms is almost identical with the former Act.

Married woman may insure her husband's life for her separate use.

1. That a married woman may effect a policy of assurance on her own life or on the life of her husband for her separate use.

The policy and all benefit thereof, if expressed to be for her separate use, immediately vests in her, and is payable to her and her heirs, executors, and assignees, excluding the *jus mariti* and right of administration of her husband, and is assignable by her either *inter vivos* or *mortis causa* without consent of her husband. The contract in the policy, it is declared, shall be as valid and effectual as if made with an unmarried woman. The husband's consent to the contract is not required, and the policy is the wife's property.

This places married women in the same position as they occupy in regard to earnings under the Act of 1877, and to this extent a married woman is treated as a *feme sole*.

As regards succession, such a policy will fall under the operation of secs. 6 and 7 of the Married Women's Property Act of 1882, to be afterwards referred to.

Married man may insure his life for his wife and children.

§ 84. 2. A policy of assurance effected, under the Act, by any married man on his own life, and expressed upon the face of it to be for the benefit of his wife or of his children or of his wife and children shall, with all benefit thereof, be deemed a trust for the benefit of his wife for her separate use, or for the benefit of his children, or for the benefit of his wife and children.

If the husband takes the policy in these terms, it vests in him and his legal representatives in trust for the purposes so expressed; or, if he thinks proper, he may vest it for these purposes in other trustees, by a writing duly intimated to the assurance office.

Whether the trust remains in the husband, or is transferred to other trustees, it creates an interest in the bene-

ficiary which is indefeasible, so far as the husband is concerned. The wife or children, as the case may be, may, however, surrender the policy,[1] and deal with the proceeds. The trustee of the policy, whether the husband or a stranger, must be a consenter, as trustee, to the receipt to the Assurance Office, but the policy is not otherwise under his control. If the trust remains in him, the beneficiaries cannot recover the proceeds directly on his death; but must do so through his legal representatives in whom the trust is continued by the statute.[2]

The receipt of the trustee of the policy for the sums thereby secured, or for the value thereof in whole or in part, is declared by the statute to be a sufficient and effectual discharge to the Assurance Office.

This power not affected by domicile of husband.

§ 85. There is no limitation in the Act as there is in the case of the Act of 1881, to be afterwards mentioned, as to the domicile of the husband. A domiciled German can take advantage of the Act as fully as a domiciled Scotsman.[3]

Policy should express the interests the beneficiaries are to take.

§ 86. The policy may and ought to declare specifically the interests which the beneficiaries are to take. If this is not done, and the policy is expressed simply in the words of the Act, "for the benefit of wife and children," the question arises what are their respective interests? It is to the policy, not to the Act, or to the practice in reference to antenuptial contracts of marriage, that we must look to ascertain what the assured intended.[4]

[1] Schumann *v.* Scottish Widows' Fund, 5 March, 1886, 13 R. 678. It is otherwise in England, Griffith, The Married Women's Property Acts, by Bromfield, p. 83; but the language of the English statute is different.

[2] Cf. Newman *v.* Belsten, 76 L. T. Journal, 228.

[3] Schumann *v.* Scottish Widows' Fund Society, *supra*.

[4] Per North, J., in *re* Seyton, *infra*. See also Schumann *v.* Scottish Widows' Fund Society, *supra*. Per Lord Deas in Walker's Executor *v.* Walker, 19 June, 1878, 5 R. 969.

In England, opinion has varied. First, it was held that the proceeds of the policy were to be distributed as if the husband had died intestate;[1] then it was suggested, by the Court, that the wife takes a life interest only, with remainder to the children,[2] and lastly it has been decided that the wife and children who survive take as joint tenants, and not as in a case of intestacy. Children who predecease the assured take no interest.[3] If all the beneficiaries predecease him the policy will apparently in England revert to him. The Scotch statute makes no provision for the case, and this should therefore be done in the policy.

In a recent Scotch case a destination in a life policy was discussed, but the question turned upon the common law, not upon the statute, and was not decided.[4]

Post-nati. The fact that the policy is an immediate declaration of trust, will not prevent children born subsequently to its date, but before the trust fund comes into existence, taking as joint tenants with those already born.[5]

Donation of policy. An ordinary policy was effected and kept up by the husband, but was made payable to the wife, her heirs, executors, and assignees; the husband died leaving the policy standing in these terms, when it was held to be a donation to the wife, and that it therefore passed at law to her own heirs *in mobilibus*.[6] Under the Married Women's Property Act, to be

[1] *Re* Mellor's Policy Trusts, L.R. 7 Ch. D. 200. This decision was explained in *re* Seyton, *infra*.

[2] *Re* Adams' Policy Trusts, L.R. 23 Ch. D. 525.

[3] *Re* Seyton; Seyton *v.* Satterthwaite, L.R. 34 Ch. D. 511. *Infra*, p. 196.

[4] Chalmer's Trustees, 16 March, 1882, 9 R. 743.

[5] M'Gregor *v.* M'Gregor, 1 De G. F. and J. 63; Seyton, *ut supra*.

[6] Smith *v.* Kerr, 5 June, 1869, 7 M. 863. The policy was on the wife's life, but this does not affect the point. See Walker's Executor *v.* Walker, 19 June, 1878, 5 R. 965; Buchan *v.* Porteous, 13 Nov. 1879, 7 R. 211.

immediately referred to, assuming such a policy to be the wife's and the husband to be the survivor, it would now be subject to *jus relicti.*

If a man having an ordinary policy on his own life surrenders it, and takes in substitution a policy under the Act for the benefit of his wife, it will be protected, although it may have some incidental advantage if the old policy had no actual surrender value.[1] Substituted policy protected.

§ 87. The Act seems to assume that delivery of the policy, when effected by the husband, is not required in order to vest the right in the beneficiaries. This is contrary to the ordinary rule. A policy of assurance effected by a man on his own life in favour of trustees for behoof of his wife and the children of the marriage, but not communicated to the trustees, does not, at common law, confer a vested right in the beneficiaries. To do so there must be delivery, active or constructive, of the policy. If undelivered it will pass to the husband's creditors upon his sequestration.[2] A policy under the Act would, in such circumstances, remain the property of the beneficiaries. Delivery of policy not required.

THE MARRIED WOMEN'S PROPERTY (SCOTLAND) ACT, 1881.[3]

§ 88. In 1881 the Legislature upon the preamble that it is just and expedient to protect to a further extent the property of married women in Scotland passed the Married Women's Property (Scotland) Act, 1881. The Act received the Royal assent on 18th July, 1881, and took effect from that date. Parts of this statute apply to all marriages after its date.

This statute is "not very carefully or skilfully drawn,"[4]

[1] Holt *v.* Everall, L.R. 2 Ch. D. 266. *Infra*, p. 197.

[2] Jarvie *v.* Jarvie, 28 Jan. 1887, 14 R. 411; Hill *v.* Hill, 1755, M. 11580. See Walker's Executor *v.* Walker, *supra*, p. 64, note [6].

[3] 44 and 45 Vict. c. 21, Appendix, p. 197.

[4] Per Lord Blackburn in Paterson *v.* Poe, L.R. 8 App. Ca. at p. 680. These Acts do not seem to be favourites with the judges. Speaking of the English Act of 1882, Lord Esher, M.R., says, "It is truly a most

but it introduces very extensive changes. Certain parts of it apply to all marriages: other parts only to those which have taken place since its commencement. Shortly stated the provisions of the Act are as follows:

Exclusion of *jus mariti*.

§ 89. If at the time of the marriage the husband have his domicile in Scotland [1] the wife's moveable estate, whether acquired before or during the marriage, is by operation of law vested in her, as her separate estate, and is not subject to the *jus mariti*.

The rents and produce of heritable property in Scotland belonging to any woman married after the date of the statute are in the same position, and also are not subject to the right of administration of her husband.

Wife's receipts.

The income of the wife's moveable estate is payable to her, and her individual receipt therefor is sufficient. To this extent, the husband's right of administration is excluded. She cannot, however, assign the prospective income of that estate unless with her husband's consent, that is in his capacity as curator, or without that consent dispose of such estate. She may gift the current income to her husband, and if she does, her representatives after her death are not entitled to call the husband to account for his intromissions.[2]

extraordinary Act of Parliament, and the reason of that in my opinion is that those who passed it tried to effect an impossibility." *In re* Armstrong, 5 Morrell's Bankruptcy Cases, at p. 203.

[1] This is the common law rule. In the absence of contract, the mutual rights of husband and wife to each other's moveables, *acquisita* or *acquirenda*, are determined by the husband's domicile at the time of the marriage.—Dicey on *Domicil*, p. 268. Guthrie's *Savigny*, p. 240 *et seqq*.

[2] Edward *v.* Cheyne (No. 2) 1888, L.R. 13 App. Ca. 385, S.C. 15 R H.L. 37. For the English cases, see White and Tudor, *L.C.*, i. p. 579 (6th ed. 1886).

§ 90. The effect therefore is that the Act ousts the *jus mariti* as regards the wife's moveable property, but gives her no new or increased power in dealing with it or with her heritable estate, except as regards accruing income. The right of administration and the husband's curatorial power remain as they were, save as regards rents and receipts for income.

Husband's right of administration remains.

In this respect the general estate of a married woman is in a somewhat different position from her earnings. From these by the Act of 1877 both the *jus mariti* and right of administration of the husband are excluded: and they are to be deemed to be settled to her sole and separate use, and her receipts are a good discharge not only for such earnings but also for the investments thereof. If so, then, she must be able to sue for such earnings, and to realize these investments without reference to her husband. For instance, if she buys a house with her earnings[1] she can let it or sell it without consent of her husband: but she could not do so if the house came to her by bequest, or was her property at the date of the marriage. It has been decided in the Sheriff Court, that after a wife has ceased to reside with her husband—without sufficient reason—she is not entitled without her husband's consent to remove her furniture from the matrimonial residence.[2] This is upon the ground that the husband's right of administration remains entire, and that the act in question is a disposal of property which, under the Statute of 1881, requires his consent. This point may require reconsideration,

Different in case of Act of 1877.

[1] This was the form of investment in Mrs. Weldon's case. See Weldon *v.* De Bathe, L.R. 14 Q.B.D. 339.

[2] Andrew *v.* Andrew, 18 Dec. 1884, 1 Sh. Co. Rep. 54; Dempsey *v.* Dempsey, 21 Oct. 1885, *ib.* ii. 19. It was assumed that the wife's withdrawal from her husband's house was capricious, as the Sheriff Court is not competent to inquire into questions affecting the marriage relation.

for it is settled that although a wife deserts her husband, this does not deprive her of her right to enforce an obligation come under to her by her husband.[1] Even assuming the decision to be correct, it would not apply if the furniture represented a wife's earnings since 1877.[2]

Wife's contracts.

§ 91. In the English Married Women's Property Act of 1882 express provision is made in regard to contracts by a wife. There is nothing of this in the Scotch Act, which relates solely to the *property* of married women. The powers of a married woman to contract, in reference to her separate estate, are therefore those which exist at common law when the *jus mariti*, but not the right of administration, is excluded. The effect of the exclusion of the *jus mariti*, in the case where the wife, with consent of her husband, carries on a separate business is, it has been held, that he is not liable for the debts she contracts in connection with it.[3]

The wife can by contract bind her separate estate; but the husband's consent is still necessary to validate the deed, except in cases under the Acts of 1861 or 1877.

Wife's moveable estate protected against diligence of husband's creditors.

§ 92. The wife's moveable estate is likewise protected by the Act against the diligence of the law for her husband's debts, provided it is invested, placed, or secured in her name or in such terms as clearly to distinguish it from the estate of her husband. This proviso does not apply in the case of such corporeal moveables as are usually possessed without a written or documentary title.[4]

[1] Smith *v.* Smith, 11 Jan. 1866, 4 M. 279.

[2] See Weldon *v.* De Bathe *supra*, p. 67; Green *v.* Green, 5 Hare 400 n.; Wood *v.* Wood, 19 W.R. 1049.

[3] Palliser *v.* Higgins, 1888, 4 Sh. Co. Rep. 323; Sellars *v.* Buist, *ib.* 5, 331.

[4] This covers the case of such articles as furniture. See Duncan *v.* Gerrard, 1888, 4 Sh. Co. Rep. 246; M'Intosh *v.* Macrae, 1887, *ib.* 317; Allan *v.* Wishart, 1890, 6 Sh. Co. Rep. 185. *Infra*, § 222.

The effect of the husband's bankruptcy will be considered hereafter.

Act applies only to marriages of men domiciled in Scotland.

§ 93. The Act, it will be observed, deals so far as concerns moveable estate, only with marriages of men domiciled in Scotland. If therefore a Scotch woman marries a foreigner not domiciled in Scotland at the time of the marriage, and they afterwards come to reside and obtain a domicile here, the *jus mariti* apparently will subsist as before.[1] The wife of a naturalized British subject is thus placed in a different position from that of a domiciled Scotchman. The domicile of the wife, it will be remembered, is that of her husband, no matter what it was before her marriage.[2]

English Act different.

There is no such qualification in the English Act of 1882, which in its corresponding section (sec. 1) applies to all married women whether they were married before, or on or after its commencement (1st January, 1883) and irrespective of the domicile of the husband at the date of the marriage. That domicile may no doubt affect the rights or obligations of the parties in certain cases;[3] but an English domicile on the part of the husband is not made a condition of the applicability of the Act.

Neither the Act of 1877 nor that of 1880 is limited to persons domiciled in Scotland at the time of the marriage.

Marriages before the Act.

§ 94. As regards marriages prior to 18th July, 1881, the Act makes the following regulations:—

[1] This is to a certain extent inconsistent with § 6 of the Act, but it seems the plain inference from the language used. See Lashley *v.* Hog, 1804, 4 Paton App. 581; reversing M. 4628, 4619; Kennedy *v* Bell, 2 Feb. 1864, 2 M. 587. Fraser, *Husband and Wife*, ii. p. 1265.

[2] See Dicey on *Domicil*, p. 104.

[3] See *e.g.* De Greuchy *v.* Wills, L.R. 4 C.P.D. 362. *Supra*, § 79.

Jus mariti not touched if provision made for wife before Act.

1. If the husband has by irrevocable deed, executed prior to 18th July, 1881, made a reasonable provision for his wife, in the event of her surviving him, the Act does not apply to the effect of excluding the husband's *jus mariti* and right of administration to any extent.

If no such provision made *jus mariti* is excluded as to acquirenda.

2. If no such provision has been made, then the *jus mariti* and right of administration are excluded as regards property and income acquired by the wife after the date of the Act to the same extent respectively as if the marriage had taken place after the above date.

If the property has vested in the wife prior to the commencement of the Act, this provision does not apply, although it may happen that she has not begun to reap benefit from the property until after the Act, by reason of an interposed liferent or otherwise.[1] Such property can, however, be protected by mutual deed under the next clause (Act, sec. 4).

All persons married before date of the Act may come under it by deed.

§ 95. All persons married prior to 18th July, 1881, may by mutual deed declare that the wife's whole estate, including any that has already vested in the husband, shall be regulated by the Act. This deed is to be registered and published in a certain manner. The wife's estate must likewise be kept distinct as in the case of marriages subsequent to the Act.[2]

[1] Scott's Trustee *v.* Scott, 20 Feb. 1889, 16 R. 507; see Henderson *v.* Henderson, 25 Oct. 1889, 17 R. 18; Craig *v.* Lindsay, 24 Dec. 1886, 3 Sh. Ct. Rep. 215; *Re* Parsons, 34 W. R. 603.

[2] This provision has been taken advantage of to some extent:—

Year.	No. of Advertisements in the *Edinburgh Gazette*.	Year.	No. of Advertisements in the *Edinburgh Gazette*.
1882,	16	1886,	16
1883,	12	1887,	13
1884,	14	1888,	11
1885,	11	1889,	12

Under this enactment, therefore, all property which has already vested in the husband can be transferred to the wife, and she can be put in the same position as respects both *acquisita* and *acquirenda*, as if she had been married on or after 18th July, 1881. This is a most important provision, as at common law a husband could only make a very limited provision for his wife out of what had been her own property, and which had vested in him *jure mariti*.[1] The power conferred by the statute is limited by the proviso that no such deed shall be of any effect as against any debt or obligation contracted by the husband prior to the date of the deed being advertised and registered as directed. Such a deed would in any case be invalid if the husband was insolvent at the time;[2] but the protection to creditors, it will be observed, goes further than this.

Deed ineffectual if husband insolvent at the time.

A deed executed under the powers of this section cannot affect the provisions of a contract of marriage. Such contracts are (sec. 8) specially saved. If the wife's property has, prior to the Act, been vested in herself or in trustees, the Act does not apply. It only deals with the case of property which has vested in the husband *jure mariti*.

No provision is made for the case of persons married subsequently to the Act, where the husband was not domiciled in Scotland at the date of the marriage, and who come to settle here.

Jus relicti.

§ **96.** The statutory exclusion of the *jus mariti* would probably operate not only during the marriage, but after its dissolution. If so the consequence would be that if the wife were the survivor she would take her *jus relictae*, while, if the husband were the survivor, he would take nothing. Whether this would have been the result matters

[1] *Infra*, § 187. [2] *Infra*, § 191.

not,[1] as special provision has been made for the case and a new rule established.

Since the passing of the Act, every husband who survives his wife takes, by operation of law, the same share and interest in her moveable estate as is taken by a widow in her deceased husband's estate,[2] provided the wife died domiciled in Scotland. As the wife's domicile is that of her husband, the enactment really applies to the case of a husband domiciled in Scotland at the date of his wife's death. In other words, the *jus mariti* having disappeared, the legislature has created in favour of the husband a right corresponding to *jus relictae*. A widower, if a domiciled Scotsman, is now in the same position as a widow; he has *jus relicti*, she has *jus relictae*, and the two are the same *mutatis mutandis*.

Extent of the *jus relicti*.

§ **97.** In certain respects the new right conferred upon a husband is more extensive than the *jus mariti*. When, under the old law, the *jus mariti* was excluded by contract or destination, the husband took nothing during his wife's lifetime; and upon her death, unless she disposed of it by testament, her moveable estate passed to her own next of kin, of whom the husband was not one. Now, a surviving husband takes one third or one half, as the case may be, of all the estate from which his *jus mariti* is excluded by the statute, whether the wife has died testate or intestate, and in the former case in spite, it may be, of her testamentary arrange-

[1] The separate use created by the English Acts has been termed an "intermittent fetter," and has been held to be exhausted on the wife's death, when, in case of intestacy, the husband takes as before. See Cooper *v.* Macdonald, L.R. 7 Ch. D. 296: and White and Tudor, *L.C.*, i. 596, 597 (6th ed. 1886). But in Scotland the husband took no part of the wife's separate estate if she died intestate. There can be little doubt that but for this provision a surviving husband would have taken no part of his wife's moveables.

[2] There was a similar clause in Sir Erskine Perry's Bill of 1857, which extended to England alone, but it applied only in case of intestacy.

ments.[1] The result would seem to be the same where the *jus mariti* has been excluded by convention.

This will apply to all property *in bonis* of the wife at the time of her death, although it had not then been reduced, or was not then capable of being reduced into possession. Taking the parallel case of *jus relictae*, it will be remembered, that a policy of insurance in favour of a husband, whether on his own life, or upon that of his wife, or of a third person, forms part of his estate at his death, and is subject to *jus relictae*.[2] This would equally apply to *jus relicti*. It is a matter of indifference that the assured is living at the time of the death of the person against whose estate the claim for *jus relictae* lies. The principle is that if such person has a vested right which is realizable, *e.g.* by the surrender of a life policy, it is *in bonis*, whether actually realized or not.

As has been already mentioned, bonds "containing clauses for payment of annual rent and profit" are made moveable by statute, but do not fall to the husband *jure mariti* if made payable to the wife, unless the "husband have otherwayes right and interest thereto."[3] The present Statute would confer such a right, but for the qualification that a wife's claim is the measure of a husband's. The same will apply to heritable securities, and further as the husband's right to courtesy from such property is preserved,[4] he could not also claim against it as moveable.

[1] Fotheringham *v.* Fotheringham, 27 June, 1889, 16 R. 873; Simons *v.* Neilsons, 21 Nov. 1890, 28 S.L.R. 119.

[2] Muirhead *v.* Muirhead's Trustees, 6 Dec. 1867, 6 M. 95; Pringle's Trustees *v.* Hamilton, 15 March, 1872, 10 M. 621; Chalmers' Trustees *v.* Chalmers' Trustees, 16 March, 1882, 9 R. 743. There was an earlier series of decisions to a somewhat different effect, Wight *v.* Brown, 27 Jan. 1849, 11 D. 459; Smith *v.* Kerr, 5 June, 1869, 7 M. 863; Thomson's Trustees *v.* Thomson, 9 July, 1879, 6 R. 1227. Cf. the English case of King *v.* Lucas (1883), L.R. 23, Ch. D. 712.

[3] 1661, c. 32, *infra*, p. 173. [4] 31 and 32 Vict. c. 101, § 117, *infra*, p. 190.

This part of the Statute applies to all marriages whether contracted subsequent or prior to 18th July, 1881.[1]

When a provision is made by a wife for her husband by ante-nuptial contract, it is now usual to exclude *jus relicti*, just as *jus relictae* is excluded in consideration of a provision made for the wife.

Surviving husband takes no part of wife's estate if it was protected under Act of 1861.

§ **98.** If an order of protection has been obtained by a wife against her husband, or if he has been judicially separated from his wife, he will not be entitled to anything upon survivance, his case being specially dealt with by the Conjugal Rights Amendment Act.[2] The wife's property is in that case declared to belong to her as if she was unmarried, and upon her death her property passes, if she dies intestate, as if her husband had been then dead.[3]

Legitim now claimable from mother's estate.

§ **99.** Prior to the Act children had no right of legitim in regard to their mother's moveable estate. This is altered, and the children of any woman who may die domiciled in Scotland have now the same right to legitim as against their father's estate, and this irrespective of the date of their mother's marriage.

This right may be excluded, discharged, or satisfied in the same manner as in the case of legitim from

[1] Poe *v.* Paterson, 13 Dec. 1882, 10 R. 356; affd. H.L., L.R. 8 App. Ca. 678. This is contrary to the general rule that patrimonial rights of married persons are not affected by subsequent laws. Guthrie's *Savigny*, pp. 349, 351. The Conjugal Rights (Scotland) Act has also been found to be retrospective. *Supra*, § 67.

[2] 24 and 25 Vict. c. 86, § 6, Appendix, p. 185. *Supra*, § 63.

[3] In a case in England where a woman in that position left a minor son, the Court made a grant of administration of her effects to a guardian elected by the son for his use and benefit, without citing the father, the guardian, however, finding justifying securities to meet the contingency of the son dying during his minority, in which event the father would become entitled to the property. In the Goods of Stephenson, L.R. 1 P. and D. 287.

the father's estate. Seeing, however, that legitim from a mother's estate was an impossibility prior to 1881, and was not therefore excluded by marriage contract, the result is that the children of every woman married prior to the commencement of the Act, who dies domiciled in Scotland, will be entitled to claim legitim upon her death, unless the claim has been discharged since then. It is now the practice to exclude it in marriage contracts, just as in the case of the father's estate.

Consent of husband to wife's deeds may be dispensed with in certain circumstances.

§ 100. The Act provides (sec. 5) that where a wife is deserted by her husband, or is living apart from him with his consent, the Court of Session or Sheriff Court may dispense with the husband's consent to any deed relating to her estate. At common law, if a husband will not or cannot concur in a deed by his wife relative to her estate held exclusive of his *jus mariti*, the Court will authorize her to act without him, or may name another curator; and she may be sued in the same manner.

This enactment applies to all marriages whenever contracted;[1] and shows, if there was any doubt upon the point, that the husband's curatorial power remains practically as it was. It is settled that the exclusion of the husband's *jus mariti* alone, while it protects the wife's property, does not touch the husband's curatorial power.[2] To bar that power the right of administration must likewise be renounced or excluded. If both are excluded, the wife is, as regards her property, in the same position as an unmarried woman.[3] Now, except to the extent of enabling a wife, by herself or by another appointed by her, to receipt for the income of her moveable and for the rents of her heritable estate, the

What necessary to oust husband's right of administration.

[1] Poe *v.* Paterson, *supra*, p. 74.

[2] Ritchie *v.* Barclay, 5 June, 1845, 7 D. 819; Per Lord Gifford in Bryce's Trustee, 2 March, 1878, 5 R. at p. 728.

[3] Gordon *v.* Gordon, 16 Nov. 1832, 11 S. 36.

Effect.

husband's right of administration is not interfered with by the present Act. A married woman under it is in a position totally different from that of a woman whose husband's *jus mariti* and right of administration have been excluded by contract or by statute, as under the Acts of 1877 and 1880, or the Conjugal Rights Act of 1861. Her position under the present Act is that of a married woman under the old law as regarded her *paraphernalia* or her *peculium*. These were her own separate property, but she could not deal with them except with consent of her husband.[1] So, too, in still earlier times it was held, in the case of aliment settled upon a wife exempted from her husband's *jus mariti*, that she might with, but could not without, his consent grant personal obligations to affect that aliment.

The Act does not place a married woman in same position as a spinster.

§ 101. It has been remarked [2] that the English Married Women's Property Act has metamorphosed married women into spinsters, with respect to their property. This statutory transformation, however, is effected as regards Scotland only to a limited extent. The consent of the husband [3] of a married woman in Scotland is still required to a deed electing between her legitim and a testamentary provision by her father.

Husband's consent to her acts.

She cannot accept a bill of exchange or make a promissory note,[4] or enter into a personal contract, except a contract of life insurance, and that only by special statute as already explained. She may, no doubt, with consent of her husband, contract so as to bind her separate estate, but so long as she is not judicially separated from him, or he is not civilly dead,

[1] *Supra*, § 13.

[2] Per Lopes, J., in Thompson *v.* Krise, 1883, 75 L. T. Journal 235.

[3] Miller *v.* Galbraith's Trustees, 16 March, 1886, 13 R. 764.

[4] M'Lean *v.* Angus Brothers, 2 Feb. 1887, 14 R. 448. As to the old law, see Earl of Strathmore *v.* Ewing, 1832, 6 W. and S. 56; reversing 4 S. 310. See Bills of Exchange Act, 1882, § 22.

his consent is necessary to validate the contract, and when so validated, she is not personally liable upon it. A married woman, where the *jus mariti* and right of administration are excluded, may enter into a trading partnership, and to the extent of her separate property, she is liable for its debts.[1] It is doubtful whether in Scotland she could so contract with her husband,[2] even although possessed of separate estate, over which his right of administration is excluded. Without her husband's consent, she cannot, says Inglis, L.P., enter upon any calling to produce a livelihood,[3] although her earnings in any business she may carry on with his consent are protected. Formerly a partnership was dissolved by the marriage of a female partner, because her property passed, *jure mariti*, to her husband, and she could not bring him in.[4] Now that *jus mariti* does not operate, marriage will not affect the position of a female partner,[5] save in so far as her husband's curatorial consent may he required.[6]

The provisions of the Scotch statute are very much what the law of England was under the English Act of 1870. Speaking of that Act, Jessel, M.R., says it "gives no power to contract to a married woman which she did not possess before. It does make certain property, property to her separate use, to that extent carrying with it a power to contract in respect of that property which every married woman previously possessed in a Court of Equity." [7]

[1] Biggart *v.* City of Glasgow Bank, 15 Jan. 1879, 6 R. 470; *supra*, p. 21. Cf. Mrs. Matthewman's Case, L.R. 3 Eq. 781.

[2] See Macara *v.* Wilson, 15 Feb. 1848, 10 D. at p. 713, *supra*, p. 56.

[3] *Supra*, § 76, note. This statement of the law seems to be too broad.

[4] Russell *v.* Russell, 14 Nov. 1874. 3 R. 93.

[5] See Lindley, *Partnership*, p. 583 (5th ed. 1888).

[6] See Biggart *v.* City of Glasgow Bank, *supra*, note [1]; Farquharson *v.* Stott, 11 June, 1841, 3 D. 1006. The Partnership Act, 1890, does not in terms deal with the case.

[7] Howard *v.* Bank of England, L.R. 19 Eq. 301.

§ **102.** It is provided :—

Act does not affect Power of settlement;

1. That nothing in the Act shall exclude or abridge the power of settlement by ante-nuptial contract of marriage (sec. 1, subsec. 5), and

2. That it is not to affect (sec. 8) :—

Contracts between spouses;

(*a*) Any contracts made or to be made between married persons before or during marriage, or the law relating to such contracts ;

Donations;

(*b*) The law relating to donations between married persons or to a wife's non-liability to diligence against her person ;

The Act of 1877.

(*c*) Any of the rights of married persons under the Married Women's Property (Scotland) Act, 1877.

This reservation is of great importance. It not only enables parties to contract in reference to conjugal property as before, but it limits the operation of the Act to the statutory and common law rights of the husband, and does not affect the rights he has acquired by convention.[1]

The Married Women's Property Act, 1882.

English Act of 1882

§ **103.** In 1882, the scope of the English statutes was extended. The Acts of 1870 and 1874 were repealed, and the Married Women's Property Act, 1882, was substituted,[2] and the law is now very much what was proposed by the Bills of 1857. The position of a married woman in England under the new Act is totally different from anything that existed before, at least in the case of a woman living with her husband. She can now contract, sue, and be sued, acquire, hold, and dispose of property of any kind, in the same way as if she

[1] See Anstruther *v.* Adair, 2 M. and K., 513 ; Smith *v.* Smith, 11 Jan. 1866, 4 M. 279 ; Weir *v.* Parkhill, 1738, M. 5857 ; Dick *v.* Cassie, 1738, M. 5857.

[2] 45 and 46 Vict. c. 75.

were a *feme sole;* and her general legal position is made much the same as that of a man. As already mentioned, it applies to all married women in England and whenever married. The Act does not extend to Scotland, but probably a married woman whose domicile is in Scotland can avail herself of its benefits where her property is locally situated in England, or when she is a shareholder in a company whose principal office is in England, although it may carry on business in Scotland.[1]

May affect married women in Scotland in some cases.

How great has been the change in public sentiment since 1856, is shown by the fact that, although the effect of this statute was nothing short of a social revolution, there was only one debate upon it in the House of Commons, and that occupied less than a couple of hours.

The Intestates' Estates Act, 1890,[2] has improved the position of widows of intestates in England.

The Present Law.

Present law.

§ **104.** Excluding the case of marriages prior to 18th July, 1881, the law respecting the property of married persons, in the case where the husband at the time of the marriage had his domicile in Scotland, their interests in such property during marriage, and the interests of the survivor and of their children upon its dissolution stand thus:—

(a.) *The Wife's Estate.*

Corpus of wife's moveable and heritable property her own.

1. The corpus of the wife's property, both heritable and moveable, is her own.

Income her own.

2. The income of the wife's property, both heritable and moveable, is her own, and she can receipt for it.

The result is that while under the old law all this (except the wife's *paraphernalia* and *peculium* and the fee of

[1] Griffith, The Married Women's Property Acts by Bromfield, p. 147.
[2] 53 and 54 Vict. c. 29.

her heritage) became the property of the husband by mere marriage, now it remains, as it was before marriage, the property of the wife, so that if the husband were to appropriate one of her teaspoons he would be liable to be prosecuted for theft.[1] The effect of the Married Women's Property Act is to put all the wife's moveables on the same footing as *paraphernalia* and *peculium*. Shortly stated, the whole of the wife's moveable estate is now *peculium*.

All wife's moveable estate is now *peculium*.

The intention of the Act, it has been said, is to protect not to create separate estate.[2] This, however, is hardly in accordance with its language. Instead of declaring that the wife's moveable property is to remain her own, the Act vests it in her as her separate estate.

The provision made in various Acts of Parliament[3] in reference to the transmission of shares and stock in joint stock companies and shares in ships on the marriage of a female proprietor is now nugatory. These remain the property of the wife, and are not affected by marriage.

Exclusion of right of administration as to earnings.

3. The husband's right of administration is excluded from his wife's earnings. She can receipt for them and for the investments thereof.

Personal diligence.

4. No alteration has been made as regards personal diligence against a married woman. The Act of 1881 expressly declares that it is not affected.

[1] See H.M. Advocate *v.* Kilgour, 1851, 1 Stuart, 122. In that case the husband's *jus mariti* was excluded by convention; the result must be the same when it is excluded by statute. As to the civil law see D. 25. 2. 1; a special action was provided for the case. By the common law of England husband and wife being one person, cannot steal each other's goods; but this is altered by § 12 of the Married Women's Property Act, 1882; and see § 16 of that Act.

[2] Milne *v.* Milne, 8 Dec. 1885, 13 R. 304.

[3] 8 Vict. c. 17, § 19 (The Companies Clauses Consolidation (Scotland) Act); 17 and 18 Vict. c. 104, §§ 59, 74 (The Merchant Shipping Act); 25 and 26 Vict. c. 89, Table A. 13 (The Companies Act).

If at the time of the marriage the husband had not his domicile in Scotland, the Act of 1881 does not apply, and the law will stand in such a case as it was before that date. Domicile.

(b.) *The Husband's Liability for Wife's Debts.*

§ 105. The liability of a husband, married since 2nd August, 1877, for his wife's ante-nuptial debts is limited to the value of any property he shall have received through her. This applies to any married man in Scotland, irrespective of his domicile at the time of the marriage. Limitation of husband's liability for wife's ante-nuptial debts.

Seeing, however, that the effect of the Married Women's Property Act, 1881, is practically to deprive a husband of any right in or to his wife's property, his liability must, in most cases, be merely nominal, at least during the subsistence of the marriage. The only interest in heritable property which a husband now, by law, receives through his wife is his courtesy, a liferent which is seldom met with in practice, and which does not become operative *stante matrimonio*. Upon the dissolution of the marriage the husband, if he be the survivor, is likewise entitled to *jus relicti*, but it may be a question whether what he thus obtains is property received from, through, or in right of his wife. On the analogy of *jus relictae* he takes as a creditor, and not through or in right of his wife, but in his own right and because of her death. It may fairly be contended, however, that it is property received from his wife, although no doubt this is not the sense in which the words were used in the Act of 1877, when the *jus mariti* was entire. Property received by husband. Courtesy. *Jus relicti.*

If the wife's property is settled upon the husband under marriage contract, this seems fairly to fall within the scope of the Act;[1] but as the husband's interest is Under marriage contract.

[1] Ersk. 1. 6. 18; Weir *v.* Parkhill, 1738, M. 5857; Dick *v.* Cassie, 1738, M. 5857.

generally postponed to that of the wife, a claim would only arise against him after her death. As a practical remedy, such a claim would be of little use, as a creditor would have a similar claim against the same property during the wife's lifetime.[1] If the property settled under marriage contract be not that of the wife but has been contributed by a third person, the Act would seem not to apply, even although the husband takes an interest in that property.

(c.) *The Wife's Obligations.*

Wife's property is subject to her debts.

§ 106. While the wife's property is no longer liable for her husband's debts, it is still liable for her own,[2] and will, in the event of her sequestration or cessio, pass, *tantum et tale* as it stood vested in her, to the trustee for her creditors in the same way as her husband's estate would do if he were bankrupt.

Wife must still have husband's consent to her acts.

So long as the marriage subsists in its entirety a married woman must have the consent of her husband to her acts, in order that they may have validity as a legal transaction, except where the right of administration has been excluded

Exceptions.

(*a*) by convention or by destination; or (*b*) by statute, as regards insurances under the Act of 1880 and as regards her earnings and the investments thereof under the Acts of 1861 and 1877.[3]

In England when property is settled to the separate use of a married woman, she is released and freed from the fetters and disability of coverture, and invested with the rights and powers of a person who is *sui juris*;[4] but although the

[1] But see cases quoted, Fraser, *Husband and Wife*, i. 598, 599.

[2] See form of decree in Scrogie *v.* Hunter, 22 Feb. 1872, 9 S.L.R. 292.

[3] *Supra*, §§ 62, 75, 83, 84, 100.

[4] Per Lord Westbury in Taylor *v.* Meads, 4 De G. J. and Sm. 597.

Married Women's Property (Scotland) Act declares that the moveable property of a married woman is to vest in her "as her separate estate," the expression is limited in its application to the exclusion of the *jus mariti* and leaves the husband's curatorial power unaffected. A wife must still sue with consent of her husband. If an action is brought against her, he must be made a party to it. If proceedings are taken to have her estates sequestrated under the bankruptcy statutes, or for a decree of cessio against her, notice must be given to the husband.

A wife who has obtained a protection order or judicial separation is capable of entering into obligations, is liable for wrongs and injuries, and is capable of suing and being sued as if she were unmarried. In other cases a wife is not treated as unmarried but as married. But in England, since the passing of the Act of 1882, every married woman has the same protection and the same powers as those which a married woman may obtain in Scotland when she is obliged to apply for a protection order or for judicial separation.[1]

Wife not bound to maintain indigent husband.

§ **107.** The husband is bound to maintain his wife and children; but if the husband is indigent, and the wife has means of her own, she is not bound to maintain him although she must contribute to the expenses of the household.[2]

[1] The law of France is somewhat different from both. By the Code Civil, where the wife is separated either in body and goods *or in goods only*, she regains the uncontrolled government thereof. She may dispose of her moveables and alienate them. She cannot, however, alienate her immoveables without the consent of her husband, or without being thereto authorized by the Court on his refusal (Code Civil, § 1449). When again the parties have stipulated by their marriage contract that they will be separate in goods, the wife retains the entire management of her property, moveable and immoveable, and the free enjoyment of her revenues. This is the same in effect as the ordinary Scotch contract of marriage.

[2] Fingzies *v.* Fingzies, 20 March, 1890, 28 S.L.R. 6. As to the case

(d.) *Division of the Conjugal Property on the Dissolution of the Marriage.*

Division of moveable estate same on death of either spouse.

§ **108.** On the dissolution of the marriage by the death of either spouse, the rights of the survivor and of the children in the moveable property of the deceasor are the same. The date of the marriage, and the domicile of the husband at the time of the marriage, make no difference; but in order that the succession be regulated by the law of Scotland it is necessary that the husband, if he was the predeceasor, died domiciled in Scotland; that if the wife was the predeceasor, her husband was at the time of her death so domiciled; and that if she was the survivor, she was at the time of her own death domiciled in Scotland.

(*a*) If there be children by that or by any other marriage of the deceasor the division is tripartite:

One third belongs to husband or wife, as the case may be, as *jus relicti* or *jus relictae*.

One third to the children as legitim.

One third is dead's part.

(*b*) If there are no children, the division is bipartite:

Half is *jus relicti* or *jus relictae*.

Half is dead's part.

(*c*) On the death of the survivor of the spouses, survived by children of any marriage, his or her property is divided into two parts.

Half is dead's part.

Half is legitim.

Result of recent legislation.

While the division of the husband's moveables is the same as before, the result is very different since the prac-

of children where the father is dead, see Fairgrieve *v.* Henderson, 30 Oct. 1885, 13 R. 98. The wife is made liable in England by the Married Women's Property Acts (33 and 34 Vict. c. 93, §§ 13, 14; 45 and 46 Vict. c. 75, §§ 20, 21).

tical extinction of the *jus mariti*. Under the former law, if the wife brought her husband a fortune, and he died intestate and childless, then in the absence of any conventional arrangement one half of that fortune—assuming it to be moveable estate—passed immediately to his relatives, while, if there were children, even although they were not her's, but children of a previous wife, she could only keep one third of what had been her own. Now no part of her moveables passes to the husband *stante matrimonio:* and if she survives him she retains her own property, and takes as before her *jus relictae.*

Courtesy, Terce.

§ **109.** On the death of either spouse leaving heritable property, the law remains as it was.

(*a*) If the husband dies first, the wife has her terce, or a liferent of one third of the heritage in which he died infeft.

(*b*) If the wife dies first, the husband has his courtesy, the liferent of her heritage subject to certain conditions already explained.

Children have no legal claim to heritage.

In neither case have the children any claim by law. If either parent dies intestate the eldest son will take as heir-at-law, but if father or mother chooses to dispose of his or her heritage by will, none of their children have any claim.

This, it need scarcely be added, applies only to a fee-simple proprietor. In the case of an entailed estate one or other of the children must succeed, but this is in virtue of the will of some former proprietor. Whoever so succeeds takes as heir of entail, that is as heir of provision, not as heir-at-law.

CHAPTER V.

THE CONVENTIONAL ARRANGEMENTS BY WHICH THE PROPERTY OF MARRIED PERSONS IS PROTECTED AND THE INTERESTS OF THEMSELVES AND OF THEIR CHILDREN THEREIN ARE REGULATED.

Classes of family deeds.

§ 110. These arrangements are effected by means of

1. Bonds of provision.
2. Destinations.
3. Deeds of entail.
4. Marriage contracts, which may be
   (*a*) Ante-nuptial.
   (*b*) Post-nuptial.
5. Policies of assurance under the Act of 1880.

For our present purpose we need deal only with marriage contracts.

1.—ANTE-NUPTIAL CONTRACTS OF MARRIAGE.

Marriage contract overrides legal provisions.

§ 111. No deed, known in practice, plays a more important part in the affairs of modern life than an ante-nuptial contract of marriage; for, notwithstanding all that the law has provided, by custom or statute, in reference to the interests of husband and wife in their property and to the interests of children after the death of their parents, it is permitted to persons about to marry to alter the whole of these provisions, almost in any manner and to any extent they may think fit. As put by Spotiswood, the "legal provision only takes place when there's no contract or agreement betwixt the parties by

which the determination of law may be altered; for in this case, as in sundry others, *provisio hominis tollit provisionem legis.*" The Married Women's Property Act, indeed, specially and carefully provides that "nothing herein contained shall exclude or abridge the power of settlement by ante-nuptial contract of marriage."

Roman practice.

The practice of making contracts of marriage prevailed under the Roman empire. The law made certain regulations, but these could be set aside or modified pretty much as the parties desired,[1] and marriage contracts, *tabulae dotales*, were as much in requisition in imperial Rome as they are in Great Britain to-day, and on many monuments of art we see the *tabulae* in the hand of the bridegroom. These instruments, however, referred solely to the *dos*, and were much more limited in their operation than our deeds. Thus it was not permitted to a father to bargain, in a marriage contract, that the sum settled upon his daughter should be in full of what she would claim from his estate.[2] Nor could those testamentary arrangements, which form so large a part of the modern settlement, be introduced into a Roman instrument.[3]

Old opinion of marriage contracts.

§ 112. Professor Spotiswood cynically remarks that the marriage contract "expresses the condition of the marriage

[1] To be effectual, Roman marriage contracts behoved, like other contracts, not to be contrary to good morals or to be in violation of any positive law. The rule of the law of Scotland is the same.

So, too, the Code Civil provides, § 1387—"The law does not regulate the conjugal association as respects property, except in default of special agreements, which the married persons may make as they shall judge convenient, provided they are not contrary to good morals."

[2] Dig. 38. 16. 16.

[3] Code, 2. 3. 15. This is technically known as ἀλληλοκληρονομία. All bargains as to mutual succession were void; "Quia auferebant testandi liberam facultatem." Sir George Mackenzie, *Select Pleadings*, p. 50 (Edinburgh, 1673, 4to).

for, nowadays, interest has a greater hand in making marriages than love founded on a virtuous friendship contracted by long acquaintance; and men first satisfie themselves about the estate and fortune of the party before they begin to love their person." If we are to take, as authorities, the song writers of last century, there is little doubt that there was some truth in this statement. Less than fifty years ago an eminent judge gave a very blunt expression of his view of the matter, "As to ante-nuptial contracts, a man buys a wife as he buys a horse; he must buy her on conditions."[1]

Object of the deed as now used.

The object of the marriage contract of the present day is, by means of the machinery of a trust, to place a certain amount of the property of the spouses beyond their own control and out of the reach of their creditors, as a provision for themselves and the children of the marriage; to protect the wife's property against the husband and against herself; and to cut off the legal rights of the parties and their children. These are, however, comparatively recent ideas. In the seventeenth and eighteenth centuries the device of excluding the *jus mariti* and right of administration had not been developed; trustees, powers and limitations were unknown, and the Scotch contract of marriage very much resembled the deed nowadays in use in France under the *régime dotal*.[2]

Tocher.

§ 113. The bride's dowry (*maritagium*) is with us known as her *tocher*—which, curiously, is a purely Celtic word.

[1] Per Lord Mackenzie *primus* in Guthrie *v.* Cowan, 21 Nov. 1846, 9 D. at p. 128.

[2] Marriage contracts have a large literature in France, and books of precedents are as plentiful as with us.

Settlements on marriage, in the English sense, are, however, practically unknown in France. See an interesting article on "Marriage Settlements according to English, and Marriage Contracts according to French Practice" in *The Cornhill Magazine* (1863), viii. 666 *et seqq*.

This was a sum of money paid or secured to the husband by the wife or her relatives.[1] As a counterpart and as his contribution *ad sustinenda onera matrimonii* the husband also provided a certain sum.[2] The combined amount it was the practice to "ware" or lend out upon wadset or some other form of landed security, or in the purchase of land.

Donatio propter nuptias.

[1] See Balfour, *Practicks*, p. 99; and per Lord Murray in Kippen's Trustees *v.* Kippen, 3 July, 1856, 18 D. at p. 1164; Per Lord Neaves in Harvey *v.* Farquhar, 12 July, 1870, 8 M. at p. 975.

Dos was used for both terce or dower and dowry. "This Latin word, *Dos*, hes ane secund signification, conforme to the civill law of the Romans: And is called, that quhilk is giuen be the woman's friends with her, to the husband, and commonlie is called *Maritagium* (*or tocher*)." *Regiam Majestatem*, ii. c. 18 (c. 15, ed. Innes); Glanvil, vii. c. 1; Magna Charta, c. 7 (Stubbs' *Select Charters*, p. 298). See *supra*, pp. 3, 40. There is a curious note on this subject in the Law Reports, 2 Sc. App. at p. 193.

[2] The husband's contribution was likened to the Roman antipherna (ἀντιφερνη) or counter-dos; in later days *donatio propter nuptias*. See Inst. 2. 7. 3; *Regiam Majestatem*, ii. c. 15, ed. Skene, (c. 12, ed. Innes). This passage is not in Glanvil. The analogy, however, was in name rather than in substance. See per Lord Monboddo in Lowther *v.* M'Laine, 1786, Hailes, 1012.

As to the mutual contributions, see *Liber Officialis S. Andree*, Nos. 2, 4, 5, 7 (anno 1515), 8, 11, 12, 15, 20, 22, 140 (anno 1544), and elsewhere.

On the marriage between Eric Magnusson, King of Norway, and Margaret, daughter of Alexander III. of Scotland, in 1281, the latter agreed to pay 14,000 merks sterling *in dotem*, while the King of Norway undertook to pay 1,400 merks of land "*in donacionem propter nupcias*." Acts of the Parliament of Scotland, i. p. 79; Rymer's *Fœdera*, vol. i. part 4, p. 83 (ed. Hag. 1739).

From the Epistle of Innocent III. to the Archdeacon of St. Andrews, 1203 (*Decretalia Gregorii*, iv. 20, c. 6), it would appear that this arrangement was in force in Scotland at that time.

The Act 1573, c. 55 (c. 1, ed. Thomson), the statute which authorises divorce on the ground of desertion, recognises tocher and *donatio propter nuptias*.

In England the notion at one time prevailed that an ante-nuptial provision by a husband for his wife operated as a purchase by him of her property. Vaizey, *Treatise on the Law of Settlements of Property*, i. p. 84 (London, 1887).

The deeds of security or purchase were taken, or conceived —to use the old phrase—in favour of the spouses in conjunct fee and liferent, or to the husband and wife and children in liferent and fee in one or other of the varieties of what are termed "conjunct destinations,"[1] now practically in desuetude, but which gave rise to many artificial rules of construction that have been subjected to severe criticism by modern judges.[2]

Old form of marriage contract.

§ 114. The marriage contract simply regulated the sums—tocher and *donatio propter nuptias*—that were to be contributed by the parties respectively, their interests in the amount and the manner in which it was to be invested. Sometimes its ultimate disposal was left to be regulated by law, sometimes it was regulated by the deed. As a rule, the legal claims of the children were not discharged, so that they could claim these, over and above their provision in the marriage contract. The husband's *jus mariti* and right of administration were not interfered with. Whatever portion of the wife's moveable estate was not brought under the contract passed to the husband *jure mariti*, and he had his courtesy, if he survived, just as if there had been no deed.[3] It was generally the same as regarded the wife.[4] If she died first her share of the goods in communion passed to her next of kin; if she survived she had her *jus relictae* and her terce.

[1] As to conjunct-fee, see Balfour, *Practicks*, p. 101.

[2] *E.g.* Per Lord Curriehill in Kippen's Trustees *v.* Kippen, 3 July, 1856, 18 D. at p. 1185.

[3] Sometimes he accepted an annual sum in lieu of it, as in the case of Mr. Francis Montgomery and the Countess of Leven, which gave rise to one of the most notable law suits of the seventeenth century. Earl of Leven *v.* Montgomery, 1683, M. 5803-5819.

[4] Sometimes she accepted certain conventional provisions in lieu of her legal rights. See, for instance, Craig *v.* Monteith, 1684, M. 5819; The Lord Justice Clerk (Lord Ormistoun) *v.* Hamilton of Bangor, 1708, M. 5909, another noted and protracted plea.

So far from excluding a claim to terce, the contract often expressly reserved it.[1] Where nothing was said, she got both terce and the conventional provision, but this was altered by the statute 1681, c. 10 (c. 12, ed. Thomson), which provided that where a particular provision has been granted by a husband in favour of his wife by marriage contract or other writ before or after marriage, the wife is thereby secluded from a terce unless it has been expressly reserved to her.[2] Terce.

§ 115. By the scheme of the modern ante-nuptial contract of marriage—where there are no family estates to be dealt with—the husband obliges himself (1) to pay a certain annuity to the wife if she be the survivor, and in the same event to give her his household furniture, absolutely or in liferent, and a sum of money for immediate purposes; and (2) at a specified time during his lifetime, or it may be upon his death, to pay a certain capital sum to the children. As security for the performance of these obligations he assigns, or undertakes to assign, within a specified time, to trustees, money or property to be held by them for payment on his death of the wife's provisions and the children's portions, and of the income to himself during his lifetime. Scheme of the modern marriage contract.

The wife, on the other hand, assigns to the same trustees her estate, present and future,—excepting jewellery and the like and property that may fall to her, by succession or otherwise, of less than a certain minimum value, generally £200 or £300,—to be held first for herself in liferent, then

[1] See Contract of Marriage between William Mure of Glanderstoun and Elizabeth Hamilton, 3 July, 1559, quoted *supra*, p. 40, note [2].

[2] Appendix, p. 176. As to this Act, see Craigleith *v.* Prestongrange, 1681, M. 15845; Jankouska *v.* Anderson, 1791, M. 15868 and 6457; Per Lord Curriehill *primus* in Keith's Trustees *v.* Keith, 17 July, 1857, 19 D. at p. 1065.

for her husband in liferent, and, lastly, for the children of the marriage, or for her children by any marriage, as may be agreed, whom failing, her own heirs and assignees.[1]

This is the common arrangement, and while variations occur in detail, owing to difference of circumstances, it may be accepted as a type of the deed in general use.

When there is a family estate, on either side, special arrangements regarding it may require to be made, but these will not alter the general framework of the deed. The English family settlement is practically unknown in Scotland. Its object is so far attained by the deed of entail.

The assignation of the wife's *acquirenda* is a matter for consideration, as it may sweep into the marriage-contract trust, property never intended to be placed under it, and which the donor may have expressly declared was not to fall under it. A mere declaration by a testator that a bequest is to remain the property of a married woman is ineffectual to prevent the operation of such an assignation. His object can only be attained by means of another and continuing trust.[2]

Reason for vesting wife's property in trustees.

§ 116. Although the *jus mariti* may be excluded, as is now universally the case by virtue of the Act of 1881, and the wife's estate is thus her own absolute property, she may gift it to her husband, or she may lend it to him, or it may be mixed with his, events which entail very serious consequences in the event of his bankruptcy. To protect the wife, therefore, against herself and against the influence of her husband ("*reverentia maritalis*," or "matrimonial importunity," as it has been variously styled), the plan is adopted of vesting her property, with the exceptions above mentioned, in

[1] Smith *v.* Brown, 18 July, 1890, 27 S. L. R. 995; Simons, 21 Nov. 1890.

[2] Douglas' Trustees *v.* Kay's Trustees, 2 Dec. 1879, 7 R. 295; Simson's Trustees *v.* Brown, 11 March, 1890, 17 R. 581.

the marriage contract trustees for certain definite purposes.[1] If this is done, the Court will not, even with consent of the parties, allow the contract, as regards the spouses and children, to be revoked, whether it be ante-nuptial or post-nuptial.[2] The rule is different as to collaterals and other strangers to the marriage consideration. The deed as concerns them is testamentary and revocable. They are volunteers; they are heirs *in destinatione* only, and have merely a *spes successionis*. They may, in certain cases, have an indefeasible claim, but then it is in virtue of contract.[3]

Marriage contract provisions cannot be recalled.

Except as regards strangers to the consideration.

[1] See per Lord Cottenham in Rennie *v.* Ritchie, 1845, 4 Bell App. at p. 244.

[2] Torry Anderson *v.* Buchanan, 2 June, 1837, 15 S. 1073; Pringle *v.* Anderson, 3 July, 1868, 6 M. 982; Allan *v.* Kerr, 21 Oct. 1869, 8 M. 34 (a case of post-nuptial settlement); Cosens *v.* Stevenson, 26 June, 1873, 11 M. 761; Menzies *v.* Murray, 5 March, 1875, 2 R. 507; Low *v.* Low's Trustees, 20 Nov. 1877, 5 R. 185 (a case of post-nuptial settlement); Montgomery's Trustees *v.* Montgomery, 2 Feb. 1888, 15 R. 369; Halkett *v.* Penney, 19 March, 1890, 27 S. L. R. 551, 17 R. 719.

The rule does not apply to a policy of insurance under the Act of 1880, Schumann *v.* Scottish Widows' Fund Society, 5 March, 1886, 13 R. 678.

It is, of course, different when the wife has the ultimate interest and that only is being dealt with, Ramsay *v.* Ramsay's Trustees, 24 Nov. 1871, 10 M. 120; so also after the dissolution of the marriage without issue, M'Leod *v.* Cunninghame, 20 July, 1841, 3 D. 1288, aff. H. L. 5 Bell App. Ca. 210; M'Lean's Trustees *v.* M'Lean, 23 Feb. 1878, 5 R. 679; or even when there is issue, Craigie *v.* Gordon, 17 June, 1837, 15 S. 1157; *infra*, § 143.

The case of a voluntary settlement by an unmarried woman without reference to marriage and not in favour of any existing beneficiary is also different, and is revocable. Murison *v.* Dick, 10 Feb. 1854, 16 D. 529; Mackenzie *v.* Mackenzie, 10 July, 1878, 5 R. 1027.

And when there is no trust, she can *stante matrimonio* renounce any right in her favour. Standard Property Investment Co. *v.* Cowe, 20 March, 1877, 4 R. 695.

[3] The law is fully explained in Mackie *v.* Herbertson, 1884, L.R. 9 App. Ca. 303; S. C. 11 R. (H. of L.) 10; see also Craigie *v.* Gordon,

Provisions made alimentary.

§ 117. As a further protection the provisions in favour of the spouses respectively are declared alimentary. The object and effect is to prevent these being alienated by the parties, or attached by their creditors; but, as will be hereafter explained, this is not effectual as regards property set aside by a person for his or her own use.[1]

Exclusion of *jus mariti* and right of administration.

§ 118. Under the former practice the husband discharged his *jus mariti* and right of administration, and this is still done, although the passing of the Married Women's Property Act renders it superfluous as regards the former. That Act does not practically affect the right of administration, and if the wife is to have full control of her property, this right must be excluded as heretofore.

Discharge of legal claims of children.

§ 119. In consideration of the provisions made for the children their legal rights are discharged; and the spouses generally discharge *jus relicti, jus relictae*, terce and courtesy:[2] but this is matter of arrangement and depends upon the amount of the provisions which are being substituted for those made by law.[3]

The discharge or restriction of the claims of children is often a matter of great importance, and is even more so now than formerly, seeing that they are entitled to legitim from their mother's as well as from their father's estate. Whenever, therefore, it is intended that the spouses shall have the dis-

17 June, 1837, 15 S. 1157, Brodie's *Stair*, ii. pp. 555-6; Vaizey, *Law of Settlements of Property*, i. p. 73.

As to cases standing upon destinations only, see Craik *v.* Craik, 29 Jan. 1735, M. 4313; Wilson *v.* Reid, 4 Dec. 1827, 6 S. 198.

[1] *Infra*, § 154.

[2] As to this discharge in the case of a marriage since the passing of the Married Women's Property Act, see Simson's Trustees *v.* Brown, 11 March, 1890, 17 R. 581; Bertram's Trustees *v.* Matheson's Trustee, 10 March, 1888, 15 R. 572.

[3] As to terce, see *supra*, § 114; Appendix, p. 176.

posal of their own estates, unfettered by the legal claims of children, an ante-nuptial contract is of paramount importance.

Domicile

§ 120. Where the intending husband and wife are domiciled in different countries the law by which the marriage contract is regulated is that of the husband's domicile at the time of the marriage,[1] but this is often made matter of convention,[2] or the facts may show that a different rule was intended.[3] The capacity of the wife to make the contract is, however, determined by her domicile of origin, not by that of her husband.[4]

Deed may be unilateral or bilateral.

§ 121. A marriage contract is generally a bilateral deed, but this is not necessary. In this, as in many other cases, a bilateral contract may be expressed in a unilateral deed.[5]

Time of execution.

Strictly speaking, a contract of marriage should be executed before the banns are proclaimed,[6] but this is not

[1] Dicey on *Domicil*, p. 274.

[2] See Earl of Stair *v.* Head, 29 Feb. 1844, 6 D. 904; Este *v.* Smyth, 18 Beav. 112; Story, *Conflict of Laws*, § 184; Chamberlain *v.* Napier, L.R. 15 Ch. D. 614; Phillimore, *Principles and Maxims of Jurisprudence*, p. 170; Dicey on *Domicil*, p. 274; Pothier, *Traité du Douaire*, §§ 18-20.

[3] Corbet *v.* Waddell, 13 Nov. 1879, 7 R. 200.

[4] Cooper *v.* Cooper, H. of L. 13 App. Ca. 88. This is the same as the capacity to enter into marriage itself. Dicey on *Domicil*, p. 202.

[5] See per Lord Deas in Forrest *v.* Robertson's Trustees, 27 Oct. 1876, 4 R. at p. 37.

[6] Spotiswood, *Stiles*, p. 176 (Edinburgh, 1708). The reason of the rule as to execution before the banns was that, in law, the proclamation of banns is so far equivalent to marriage itself that after that time the intended husband must be consenter to any deed by the woman affecting her property and consequently his rights which accrued on marriage. See Blair's Trustees *v.* Malloch, 1776, M. 5846; Murison *v.* Dick, 10 Feb. 1854, 16 D. 529; Bell, *Pr.* § 1551; Fraser, *Husband and Wife*, i. 680. Hence in the marriage contract she disponed her property with his consent. See Countess of Strathmore *v.* Bowes, White and Tudor, *L.C.*, i. 471 (6th ed.). That consent is of little importance since the passing of the Married Women's Property Act, as the husband takes

observed in practice. As a rule, the deed is executed at least one day before the wedding; but a contract, the terms of which are settled before marriage, will probably not lose its ante-nuptial character by being signed after the ceremony.[1] If a contract is executed after marriage in fulfilment of a prior obligation, it will be held equivalent to an ante-nuptial deed.[2]

Marriage contracts do not require to be intimated to creditors of the parties.

§ 122. It was decided in one case[3] that in order to make a marriage contract binding upon the creditors of the parties, it is not necessary that intimation of its terms be made to the creditors, but it is not easy to see how the doctrine of intimation can apply, or how intimation could be made if it did. This, of course, does not apply to the completion of a title to property or securities, conveyed under the contract. When intimation is required as an incident of title, it must be given as in the case of an ordinary assignation.[4]

Creditors must be on their guard against marriage contracts as against other latent obligations. They are not entitled to assume that a man married without a marriage contract, and they should make inquiry.[5]

POST-NUPTIAL CONTRACTS.

Object of post-nuptial contracts.

§ 123. "To supply the want of a contract in runaway or

nothing by the marriage, except his contingent right to *jus relicti* and courtesy.

[1] Cooper *v.* Cooper's Trustees, 9 Jan. 1885, 12 R. 473, and see per Lord Watson, S.C. L.R. 13 App. Ca. at p. 103. Lord Macnaghten doubted this proposition, *ib.* p. 107. The other judges did not share this doubt.

[2] Brown *v.* Govan, 1 Feb. 1820, F.C.

[3] Rollo *v.* Ramsay, 28 Nov. 1832, 11 S. 132.

[4] Tod's Trustees *v.* Wilson, 20 July, 1879, 7 M. 1100; Campbell's Trustees *v.* Whyte, 11 July, 1884, 11 R. 1078; More *v.* Giersberg, 1 June, 1888, 15 R. 691.

[5] Per Lord Meadowbank and others in Herries, Farquhar & Co. *v.* Brown, 9 March, 1838, 16 S. 963; and Lord Mackenzie in Rollo *v.* Ramsay, 28 Nov. 1832, 11 S. 132. *Supra*, § 20.

hasty marriages," says Spotiswood, "the married couple may cause write one of the same tenor with an ante-nuptial contract, which, by law, in so far as the provisions are rational, will bind parties to the observance of the conditions."[1] Nowadays runaway couples do not as a rule much concern themselves about settlements. Post-nuptial contracts are now generally the anxious effort of sober couples to place a portion of the husband's property beyond the reach of his creditors and the risks of trade.[2]

Scheme of the deed.

§ 124. Provision is made for wife and children, as in the case of an ante-nuptial contract, but as marriage no longer exists as consideration, it is impossible to give the same protection as in a deed entered into before marriage. If, however, it complies with certain conditions necessary to render it effectual, a post-nuptial is just as binding as an ante-nuptial contract and the Court will not allow the interests it creates to be defeated.[3]

[1] It corresponds with the *Carta Compositionalis* of the Middle Ages, granted by a husband who had married a wife without consent of her parents. Such a deed commenced, "Dilectissime atque amantissime conjuge mea," showing clearly that it was post-nuptial. Rozière, *Recueil Général des Formules*, t. i. pp. 290-294 (Paris, 1859); Marculfi, *Formulae Veteres*, ii. No. 16. The *libellus dotis* uses the phrase "*dilecta sponsa mea.*" See Laboulaye, *Recherches*, p. 83.

[2] Lord Brougham, however, seems to have been much of the same opinion as Spotiswood. He refers to the frequency of clandestine marriages in Scotland, and says that it is "a highly important and exigent duty in such cases to provide for the interests both of the woman and the issue of the marriage. Dickson *v.* Cuninghame, 1831, 5 W. and S., at p. 695.

[3] Smitton *v.* Tod, 12 Dec. 1839, 2 D. 225; Allan *v.* Kerr, 21 Oct. 1869, 8 M. 34. In that case Inglis, L.P., remarked, "The deed in question is a post-nuptial contract, which, we have been told, is the same as a mutual disposition and settlement with a clause of revocation. I attach no weight to that argument. We all know well what a post-nuptial contract is." See *supra*, § 116, note.

The conditions to be observed in order to render a post-nuptial contract binding, in a question with creditors, will be considered in the next chapter.[1]

Powers Reserved for Dealing with Provisions.

Power of withdrawal of portion of property from the settlement.

§ 125. As the tying up of a wife's whole property, present and future, is often productive of inconvenience, power is sometimes given to her to withdraw a specified portion from the trust, so that she may have it at her own disposal. This power may be absolute, or it may be conditional upon her being the survivor of the spouses, or being the survivor and being about to re-marry, or it may be dependent upon the number of the children of the marriage, or other circumstances.

Restriction of interests on re-marriage.

§ 126. It is also common in marriage contracts to restrict the life interest of a surviving spouse to a smaller amount in the event of his or her re-marrying, or to forfeit the life interest, and substitute a fixed annuity of smaller amount. Sometimes, too, the provisions in favour of the spouses are diminished in the event of the existence of children. What was the result in such a case if the husband became bankrupt was at one time matter of controversy; but it is now settled that the husband's creditors cannot claim as against the children for the sum set free by the restriction. The contention of the creditors was that this accresced to the fee, and that the children were heirs of provision of the father, but this was overruled.[2]

Power of division or appointment.

§ 127. When a fund is destined to children, a faculty or power of division or appointment is generally reserved to the parents together or in succession, under which they can divide

[1] *Infra*, § 187 *et seqq.*

[2] Blairs v. Bell, 1782, M. 2280; Duff, *Treatise on Deeds*, p. 195.

the fund amongst their children in such proportions as they think proper. The power is generally made exercisable by any deed or writing *inter vivos* or *mortis causa;* but as "deed" has not the limited and technical meaning that is attached to it in England the latter words are hardly necessary, except, when by the use of the one expression only, it is intended to limit the exercise of the power to an *inter vivos* deed or to a testamentary deed as the case may be.

It is no objection now to the execution of such a power that any object of the power has been altogether excluded;[1] if, however, it is desired to give the parent power to restrict a child's share to a liferent merely, with fee to his issue, this must be expressly reserved or conferred upon him, otherwise it is impossible to appoint to such issue.[2] Issue of children. "A power of apportionment however created, and to whatever estate it may relate, can be nothing more or less than a power of apportionment. It enables the holder of the power to divide the fund among the objects of the power in such proportions as he thinks proper; but it does not enable him to alter the quality of the estate which is settled on them by limiting an estate of fee to an estate of liferent, nor to confer a benefit on persons who are strangers to the power."[3] Under a power to appoint among children, interests may, however, be given to grandchildren by way of settlement, with concurrence of their parent who is an object of the power.[4]

It is the English practice, therefore, to frame a contract of

[1] 37 and 38 Vict. c. 37; Mackie *v.* Gloag's Trustees, 1883, 10 R. 746, and in H.L. L.R. 9 App. Ca. 303.

[2] Gillon's Trustees *v.* Gillon, 8 Feb. 1890, 17 R. 435.

[3] Per Lord Rutherfurd Clark in Gillon's Trustees *v.* Gillon, *supra.*

[4] White *v.* St. Barbe, 1 V. & B. 399; Cuninghame *v.* Anstruther, 1872, L.R. 2 Sc. App., at p. 234; Mackie *v.* Gloag's Trustees, 2d case [reported as Mackie *v.* Mackie's Trustees] 4 July, 1885, 12 R. 1231; Lennock's Trustees *v.* Lennock, 16 Oct. 1880, 8 R. 14; cf. Bell, *Pr.*, § 1988.

marriage so as to make the objects of the power the issue,[1] and not the children only of the marriage. When this is the case, provision can be made for the issue of a deceased child, or of a child who has become bankrupt or alienated his interest under the contract.

Such a power is intended for the purpose of apportioning the fund fairly amongst the beneficiaries according to their needs, and may sometimes be used for protecting the interests of an insolvent beneficiary, or at least for keeping the fund in the family.

Execution of a power.

§ 128. It is not necessary by our law that in executing a power it should be specially recited or referred to. The power must, however, be exercised. It is not sufficient to refer to it merely.[2] Any deed which effectually expresses the will of the donee is sufficient, even although its primary purpose is different and the execution of the power is merely incidental.[3] An instrument which professes to be an execution of a power is to be held to be so, unless it is shown that it is not.[4] The power may be executed from time to time by several appointments, to suit convenience and promote advantage, as exigencies arise or as expediency may suggest.[5]

Execution must accord with the terms of the power.

§ 129. The donee of the power must execute it in accordance with its terms. He cannot go beyond these.[6] Some-

[1] In Scotland "issue" is used in a more general sense. Young's Trustees *v.* M'Nab, 13 July, 1883, 10 R. 1165.

[2] Whyte *v.* Murray, 16 Nov. 1888, 16 R. 95.

[3] Hyslop *v.* Maxwell's Trustees, 11 Feb. 1834, 12 S. 413; Bowie's Trustees *v.* Paterson, 16 July, 1889, 16 R. 983.

[4] M'Leod *v.* Cunninghame, 20 July, 1841, 3 D., at p. 1307; 5 Bell App. 252, 257; Cuninghame *v.* Anstruther, 1872, L.R. 2 Sc. App. 223.

[5] Cuninghame *v.* Anstruther, *supra*.

[6] *Supra*, § 127; Bell, *Pr.*, 1971; Reid's Trustees *v.* Reid, 17 May, 1879, 6 R. 916; See per Lord Benholme, in M'Donald's Trustees *v.* M'Donald, *infra*.

times it is attempted to hamper the gift, made by such execution, with conditions or limitations. If these cannot be disconnected from the gift, then the gift itself may be found to be involved in conditions so much beyond the power that it becomes void. If, however, the gift and the conditions are separable the former will stand, although the superadded directions and conditions are *ultra vires*.[1]

In executing a power of division or appointment, care must be taken that it does not offend against the statutory rules against perpetuities presently to be explained.[2]

Parent cannot bargain with his children.

§ 130. A parent in whom a power is vested, by a contract of marriage or similar deed, to divide funds amongst his children, cannot deal or negotiate with them in executing the power.[3] It is otherwise as regards contingent claims under a *spes successionis*, or an interest under a *jus crediti*, where the father is not executing a power.[4]

PROTECTION OF PROVISIONS.

Schemes for protection of provisions.

§ 131. Various conveyancing devices are resorted to for protecting, as far as possible, the provisions made under contracts of marriage against the contingency of the bankruptcy of a provisee or of his improvidence; and practically the same rules are followed in reference to beneficiaries under testamentary deeds. Some of the expedients in common use may therefore be considered before turning to the subject of bankruptcy itself.

Object of such arrangements.

§ 132. The object of all such arrangements is to allow as full

[1] M'Donald's Trustees *v.* M'Donald, 10 March, 1874, 1 R. 794; revd. 1875, L.R. 2 Sc. App., 482.

[2] *Infra*, § 145 *et seqq.*

[3] Cuninghame *v.* Anstruther, *supra*; M'Donald *v.* M'Grigor, 10 March, 1874, 1 R. 817.

[4] Duff, *Treatise on Deeds*, p. 216; Brodie's *Stair*, p. 556 n.

enjoyment as may be of the provision, and yet to vest in the provisee no right which can be carried off by his creditors. While this is the end to be attained, it is to be kept clearly in view that it is impossible to give any person the absolute control of property, and at the same time to limit his power of alienation or the right of his creditors to attach it. The liability of property to be attached by creditors upon bankruptcy or in the course of diligence is an incident of property, and no attempt to deprive it of that incident by direct prohibition will be effectual except under the Entail Acts. It would be void and inoperative on the ground of repugnancy.[1]

Prohibition against alienation.

At common law a prohibition against altering the succession to heritage, or even against alienation and contracting debt, is probably valid *inter hæredes*, in so far as regards gratuitous deeds, if a *jus crediti* is created in the substitutes under the destination.[2] This is in effect a tailzied succession, although not protected by the Act of 1685; but such deeds are struck at by the Rutherfurd Act,[3] and land can

[1] Logan's Trustees *v.* Ellis, 7 Feb. 1890, 17 R. 425. See per Campbell, L.P., in M'Nair *v.* M'Nair, 1791, M. 16,210, 5 W. and S., at p. 190 n.; Bell's 8vo. Cases, 546. This was an extraordinary will, It created a perpetual trust; and amongst other things, quarterly meetings of all the descendants, in all time coming, are enjoined to be held for examining the transactions of the trustee. See also Mackenzie, *Select Pleadings*, p. 40 (Edinburgh, 1673, 410). The *jus disponendi* is implied in *dominium*. *Unusquisque est rei suæ moderator et arbiter.*

[2] Craig, 2. 16; Buchanan *v.* Carrick, 25 Jan. 1838, 16 S. 358, remitted 30 May, 1842, 1 Bell's App. Ca. 368, aff. 5 Sept. 1844, 3 Bell's App. Ca. 342; Lindsey *v.* Oswald, 11 Dec. 1863, 2 M. 249, aff. 21 March, 1867, 5 M. (H.L.), 12; S.C. L.R., 1 Sc. App. 99; see per Lord Brougham in Grahame *v.* Grahame, 1831, 5 W. and S., p. 765, *et seqq.* Per Lord Balgray in the Ascog Case, 4 W. and S., App. i., p. v. *et seqq.*

[3] It has been held that anything short of what is required to constitute an effectual entail under the Act 1685, c. 22, is struck at by § 43 of the Rutherfurd Act (11 and 12 Vict. c. 36); Cunyngham *v.* Cunyngham, 9 March, 1852, 14 D. 636; Dewar *v.* Dewar, 20 July, 1842, 14 D.

only now be protected, even *inter haeredes*, by a valid deed under the former Act.[1] The Rutherfurd Act likewise (sec. 47) provides that when heritable property (sec. 52) in Scotland is, by virtue of any testamentary or other trust deed dated after 1st August, 1848, in possession either directly or through trustees of a person of full age born after the date of such deed, he is not affected by any prohibitions in the deed or by any limitations regulating the succession or restricting or abridging his possession in favour of any future heir, and that he shall be deemed and taken to be the fee-simple proprietor of such property.

Life interest of heir of entail not protected.

§ 133. Although an entail, either at common law or under the statute, preserves the corpus of the estate, and passes it intact to the next heir, it does not protect the interest of the person in possession. He is restrained from injuring the interests of the next heir, but he may do with his own as he thinks proper; and the alienation of the life interest of an heir of entail is unfortunately a transaction that is only too frequent. A liferent under a trust is in the same position. If anyone has an absolute liferent, he can do with it as he pleases. It can be attached by his creditors, and if he is sequestrated it vests in the trustee for the creditors.

Beneficiary's interest declared alimentary.

§ 134. The protection that can be afforded to provisions is dependent upon the restriction of the beneficiary's interest. Instead of an absolute right, a limited right only is conferred

1062; Ferguson *v.* Ferguson, 18 Nov. 1852, 15 D. 19; Cathcart *v.* Cathcart, 31 March, 1863, 1 M. 759.

It is sufficient now that the deed contains an express clause authorizing registration in the Register of Tailzies, 31 and 32 Vict c. 101, § 14.

[1] Hamilton *v.* Hamilton, 20 Nov. 1868, 7 M. 139, aff. 8 M. (H.L.) 48; S.C. L.R., 2 Sc. App. 12.

upon him, and that limited right is again given for a special purpose, that is, for his alimentary use.

If this is properly expressed[1] the provision is not, in so far as it is alimentary, attachable by creditors, except alimentary creditors; it does not pass to a trustee upon sequestration and cannot be assigned or anticipated by the provisee. It corresponds, to a certain extent, with the English scheme of restraint upon anticipation,[2] but that restraint is allowed only in the case of a married woman, and will not be upheld in the case of an equitable limitation in favour of a man.[3] In Scotland, on the other hand, a declaration that a fund is alimentary applies equally in the case of a man as of a woman, of a husband as well as of a wife.

Limitation of interest to a liferent.

§ 135. It is not enough to declare that a provision shall be deemed to be alimentary. The interest of the provisee must be in some way limited and machinery be provided for maintaining the limitation.[4] This may be illustrated by cases under testamentary deeds. Thus, if a father directs his trustees to pay a certain sum, or a certain proportion of his estate to one of his sons, and adds that the bequest "shall be strictly alimentary and shall not be affectable by his debts, or deeds, or by the diligence of his creditors," this will not protect the

[1] See Rogerson *v.* Rogerson's Trustee, 6 Nov. 1885, 13 R. 154; Craig *v.* Ferguson and others, 3 July, 1884, 11 R. 1038.

[2] Rennie *v.* Ritchie, 1845, 4 Bell App. Ca. 221, 12 Cl. and F. 204. The restraint may be imposed not only upon the income but upon the corpus of real and personal estate. Baggett *v.* Meux, 1 Coll. 138, 149; *Re* Ellis' Trusts, L.R. 17 Eq. 409, 412, 414.

[3] Brandon *v.* Robinson, 18 Ves. 429. Per Cotton, L.J., in Corbett *v.* Corbett, L.R. 14 P.D. at p. 11.

[4] See Cosens *v.* Stevenson, 26 June, 1873, 11 M. 761; Craig *v.* Ferguson and others, *supra*, § 134.

fund. The trustees are bound to pay it over to the child who, as soon as it comes into his possession is free to dispose of it as he pleases. There is no restraint except a moral one, upon his spending it, or giving it away next day.[1] It is quite certain that you cannot give money or anything else upon the condition that it is not to be spent, or that only so much is to be spent and the rest saved. That is a repugnancy. If you make a person proprietor he must act as proprietor.[2] Suppose that the bequest is of so much railway stock, debentures or the like, and that the trustees insert in the transfer a declaration in the same terms as are specified in the testamentary deed, as indeed it is their duty to do,[3] this will not help it. If the son chooses to sell the stock or debentures, a transferee for value will have a good title and can in no way be compelled to restore the stock or its proceeds to the son or his creditors. The intention of the testator fails because he has directed the fund to be so dealt with as to pass under the control and to be at the disposal of the beneficiary.[4]

Essentials of an alimentary provision.

§ 136. To constitute a valid alimentary provision it is essential that the fund from which it is payable shall not be within the order or disposition of the provisee. This can only be effectually accomplished by means of a continuing trust.[5] If the trustees, instead of being directed to pay or

[1] See for instance Mackenzie *v.* Mackenzie's Trustees, 10 July, 1878, 5 R. 1027, per Lord Gifford, at p. 1037; Fraser, *Husband and Wife*, ii. pp. 1377, 1486.

[2] Per Lord Young in Christie's Trustees *v.* Murray's Trustees, 3 July, 1889, 16 R. 916.

[3] *Infra*, § 139.

[4] But so long as the fund remains in the trustees' hands it will be protected. Lord Shand in Kirkland *v.* Kirkland's Trustee, 18 March, 1886, 13 R. 807; Jamieson *v.* Hoile, 3 Oct. 1890, 28 S.L.R. 51.

[5] 1 Bell's *Com.* p. 129 (5th ed.), 124 (7th ed.). Logan's Trustees *v.* Ellis, 7 Feb. 1890, 17 R. 425. Per Lord Shand in White's Trustees

transfer a capital sum to the provisee, are directed to pay him an alimentary annuity, or to hold a fund for his liferent alimentary use—as generally expressed for his liferent alimentary use allenarly—and the capital for his children, or for some other object, his interest is limited to a bare liferent. He has no control over the capital. He cannot assign the income, and it cannot be attached save for debts of the same character as the income itself, that is alimentary debts.[1]

Protection of corpus of life-rented fund.

§ 137. To protect the corpus of the fund it is necessary that the interest of the beneficiary be limited to a liferent. If he has the ultimate control of the capital he may dispose of that, or it may be attached by his creditors while his own life interest in it is preserved. Thus, if trustees are directed to hold a fund in such terms as will effectually limit the interest of the beneficiary to an alimentary liferent, but a faculty or power is conferred upon him to appoint generally to the capital by *inter vivos* deed, he may appoint to himself or to any third person. In other words, he can dispose of the capital as he thinks proper, burdened with his own alimentary liferent.[2] If he becomes bankrupt, the trustee for his creditors will be entitled to the fund, subject to the liferent. This the creditors could not touch, because it is beyond the control of the beneficiary

v. Whyte, 1 June, 1877, 4 R. at p. 793; and per Lord Deas in Gibson's Trustees *v.* Ross, 12 July, 1877, 4 R. at p. 1054; and in Smith and Campbell, 30 May, 1873, 11 M. at p. 646.

[1] 1 Bell, *Com.* p. 130 (5th ed.), 126 (7th ed.). *Supra*, § 134.

[2] Hyslop *v.* Maxwell's Trustees, 11 Feb. 1834, 12 S. 413; per Lord Deas in Balderston *v.* Fulton, 23 Jan. 1857, 19 D. at p. 300; Ramsay *v.* Ramsay's Trustees, 24 Nov. 1871, 10 M. 120; per Lord Gifford in Duthie's Trustees *v.* Kinloch, 5 June, 1878, 5 R. 861; Lindsay's Trustees *v.* Lindsay, 14 Dec. 1880, 8 R. 281; Bradford *v.* Young. 19 July, 1884, 11 R. 1135.

himself, and nothing vests in him save the termly payments as these arise.

Ambiguous direction.

§ 138. Sometimes the deed under which the provision is granted is ambiguously expressed, and it comes to be a question of construction whether there is a direction to protect the provision or not. The alternatives are whether the trustees are to pay over the fund, or to invest it in proper securities, and transfer these, subject to a declaration in terms of the deed under which they are acting; or whether they are to continue the trust for the purpose of ensuring an effectual alimentary liferent and the protection of the capital of the fund. The point is whether the direction merely refers to the manner or terms of payment, or whether it is an instruction to protect the provision.[1] This is purely a question of intention, and does not turn upon the nature of the fund itself, as whether it is cash or securities.[2] The fact that the beneficiary is not fiar, and that there is an ulterior destination, may, however, be of importance in ascertaining the necessity for maintaining the trust, and consequently the truster's intention.[3]

Direction to keep up trust to protect provisions.

§ 139. Unless there is a clear intention that the trust is to be kept up, this cannot be done if the beneficiary or those in his right demand payment or transfer of the fund, even although the provision is declared to be alimentary and in-

[1] Balderston *v.* Fulton, 23 Jan. 1857, 19 D. 293; Massy *v.* Scott's Trustees, 5 Dec. 1872, 11 M. 173; Houston or Mitchell *v.* Mitchell, 17 Nov. 1877, 5 R. 154. See also Keating and others, 17 June, 1870, 7 S.L.R. 548; Gibson's Trustees *v.* Ross, 12 July, 1877, 4 R. 1038; M'Nish *v.* M'Donald's Trustees, 25 Oct. 1879, 7 R. 96.

[2] *In re* Currey, Gibson *v.* Way, L.R. 32 Ch. D. 361; *In re* Bown, O'Halloran *v.* King, L.R., 27 Ch. D. 411; 1 White and Tudor, *L.C.* 606.

[3] See Allan's Trustees *v.* Allan, 12 Dec. 1872, 11 M. 216; Houston or Mitchell *v.* Mitchell, *supra.*

alienable.[1] All that the trustees can do in such a case is to insert in the receipt for money or in the transfer of the property a declaration in terms of the direction, and in such terms as will, as far as may be, make it effectual.[2] If, on the other hand, it is the clear intention that the trust is to be kept up, this must be done[3] even although there is no actual direction to this effect.[4] If there is no existing trust the court cannot create one.[5]

Continuance of trust for a limited time.

§ 140. The continuance of a trust for protecting a succession may be limited to a definite period, as for instance, until the time of actual payment arrives, and a provision of capital as well as of income may be effectually made alimentary during that period. When, however, the period expires, and the trust ends, so does the protection.[6]

Protection by means of a fiduciary fee.

§ 141. Although trustees under a contract of marriage or a testamentary deed may be bound to pay over money or to transfer property to beneficiaries, the destination may be such as in effect to constitute a continuing trust which will protect at least the corpus of the fund, although not so effectually as an ordinary trust. Thus if property, either heritable or moveable, is conveyed to a father in liferent for

[1] White's Trustees *v.* Whyte, 1 June, 1877, 4 R. 786; Smith's Trustees *v.* Smith, 11 July, 1883, 11 R. 1144; Clouston's Trustees *v.* Bulloch, 5 July, 1889, 16 R. 937; Brown *v.* Brown's Trustees, 27 Feb. 1890, 17 R. 517.

[2] Allan's Trustees *v.* Allan, 12 Dec. 1872, 11 M. 216; Per Lord Young in Mitchell's Trustees *v.* Smith, 7 July, 1880, 7 R. at p. 1091; Murray's Trustees v. Bloxsom's Trustees, 22 Dec. 1887, 15 R. 233.

[3] Smith and Campbell, 30 May, 1873, 11 M. 639; Cosens *v.* Stevenson, 26 June, 1873, 11 M. 761; Duthie's Trustees *v.* Kinloch, 5 June, 1878, 5 R. 858.

[4] Christie's Trustees *v.* Murray's Trustees, 3 July, 1889, 16 R. 913; As to this case, see Brown *v.* Brown's Trustees, 27 Feb. 1890, 17 R. 517.

[5] Allan's Trustees *v.* Allan, *supra.*

[6] Auld *v.* Anderson, 8 Dec. 1876, 4 R. 211.

his liferent alimentary use allenarly and his children in fee, his individual interest is that of a liferenter only, and he becomes fiduciary fiar, or trustee for his children.[1] He could dispose of his own liferent interest, as it is not protected, but he could not legally dispose of the capital, except as trustee and under obligation to re-invest, while the children could interdict a breach of trust. If a breach of trust is committed in such a case, and the fiduciary fiar becomes bankrupt, the children will be entitled to claim on his estate.[2] It is incompetent, however, to make a parent fiduciary fiar not only for his children but for a series of liferenters.[3]

Indirect protection by notice of trust being entered on company register.

§142. Seeing that municipal corporations, railway, and other public companies and undertakings allow notice of a trust to be placed upon their registers, children in cases such as the above have a certain amount of protection, as it is open to doubt whether with clear notice of a trust a corporation as the debtors in a bond or debenture, or a purchaser of stock, and it may be the company are not bound to see that the proceeds or price is applied in terms of the trust.[4]

[1] As regards heritage, Newlands *v.* Newlands' Creditors, 1794, M. 4289, affd. 1798, 4 Paton App. Ca. 43, 3 Ross, *L.C.* (Land Rights) 634.

As regards moveables, Gerran *v.* Alexander, 1781, M. 4402, 3 Ross, *L.C.*, 659; Rollo *v.* Ramsay, 28 Nov. 1832, 11 S. 132; Gordon *v.* Macintosh, 8 Dec. 1841, 4 D. 192, affd. 1845, 4 Bell, App. Ca. 105; Ferguson's Trustees *v.* Hamilton, 13 July, 1860, 22 D. 1442, affd. 1862, 4 M'Q. 397; Massy *v.* Scott's Trustees, 5 Dec. 1872, 11 M. 173; per Lord Gifford in Gibson's Trustees *v.* Ross, 12 July, 1877, 4 R. at p. 1064; Mitchell's Trustees *v.* Smith, 7 July, 1880, 7 R. 1086; 1 Bell, *Com.* 131 (5th ed.), 126 (7th ed.).

[2] Rollo *v.* Ramsay, 28 Nov. 1832, 11 S. 132.

[3] Logan's Trustees *v.* Ellis, 7 Feb. 1890, 17 R. 425.

[4] If it is otherwise, what is the object of inserting a receipt clause in every trust deed? Lord M'Laren is of opinion (*Wills and Successions*, ii. p. 342) that a purchaser is not liable for misapplication for the price

Interest of husband and wife in wife's property under common form of settlement.

§ 143. As previously stated (§ 115), the usual arrangement in settling the wife's property by marriage contract is to give a life interest to her, and on her death to the husband if he survives, and the fee to the children, in such proportions as she, whom failing, the husband may appoint, and failing children, for such purposes or for such objects as she may appoint, and failing such

of land, and points to the fact that no purchaser has been so held liable in Scotland; but this merely proves that there is no judicial decision upon the point. Hope, L. P., in Gairdners *v.* The Royal Bank of Scotland, 22 June, 1815, F. C., clearly indicates that it is the duty of a purchaser with notice of a trust to make inquiry, and that case shows the risk that is run if inquiry is not made.

In England there is a general liability in cases where personal property is clothed with a particular trust (White and Tudor, *L.C.* i. pp. 75, 109 (6th ed. 1886).

As to mortgages, see Bythewood and Jarman, *Precedents*, iii. pp. 850, 851 (4th edition, 1886). This does not seem to depend upon principles different from those recognized in Scotland.

In a recent case (Bank of Montreal *v.* Sweeny, 1887, L.R., 12 App. Ca. 617) the Judicial Committee decided upon general grounds that the words "in trust," in a certificate of Bank Stock, import an interest in some other person, although not in any specified person, and that any one dealing with the holder of such stock, without inquiry, did so at his own peril, and that if it was transferred in breach of trust, he was liable to the true owner. "Their Lordships," says Halsbury, L.C., "are led to this conclusion by the ordinary rules of justice as between man and man, and the ordinary expectations of mankind in transacting their affairs." The same principle was laid down by the Privy Council also upon general grounds in Jonmenjoy Coondoo *v.* Watson, 1884 (L.R., 9 App. Ca. at p. 566). One who deals with an attorney-in-fact, knowing that he is acting under a power of attorney, is in the same position as if he had perused the power of attorney, and takes the risk if the act of the attorney is beyond his powers. In Gairdners *v.* The Royal Bank of Scotland, *supra*, the same rule was given effect to as in the case of The Bank of Montreal. There the bank had notice of a trust.

The same principle is recognized in Scotland, although it may not have been applied in exactly similar cases, although some of them come very near them. In Gairdners *v.* The Royal Bank of Scotland, *supra*, the Bank had notice of a trust affecting a part of their

appointment, then for her next of kin. If the property is vested in trustees and these liferents are made alimentary, they are effectually protected, except as regards the wife's creditors. Wife and husband respectively take nothing more than a life interest, and during their lives, subject to the contingency of the wife's bankruptcy, they will enjoy the liferents intended.[1] On the dissolution of

own stock: it was held that they were bound by it and could not deal with the stock except subject to the trust, as to which they were put upon their inquiry. See also Macgowan *v.* Robb, 29 March, 1864, 2 M. 943; Stodart *v.* Dalzell, 16 Dec. 1876, 4 R. 236; Barnet *v.* Duncan, 14 Dec. 1831, 10 S. 128; Taylor *v.* Forbes & Co., 1830, 4 W. and S. 444. The decision of the House of Lords in this case did not turn upon fraud or connivance, as suggested by Lord M'Laren (*Wills*, ii. p. 344), but upon the general question of trust and notice. The question, remitted to the Court of Session for trial by a jury, was whether the respondents—a banking house—received certain money, knowing that it was part of an executry, and that the person from whom they received it was possessed of it as executor, and held subject to the trusts of the will, and that these trusts were not satisfied. This involves very much the same point as that in the case of The Bank of Montreal, *supra*. In Taylor's case the English decisions were cited apparently without any question being raised as to their applicability. "The doctrine of trusts has the same origin, and rests on the same principles, both in Scotch and English law; and it is desirable that it should be developed to the same extent in both systems of jurisprudence." Per Lord Westbury in Fleeming *v.* Howden, 1868, L.R. 1 Sc. App. at p. 381.

Railways and other companies, under the Companies Clauses Consolidation (Scotland) Act, 1845 (8 Vict. c. 17), are protected by § 21 of that Act. They are not bound by a trust although they have notice of it. Similar protection is given under various private Acts of Parliament, *e.g.* The Clyde Navigation Act, § 55 (21 and 22 Vict. c. cxlix.).

The Companies Act, 1862 (25 and 26 Vict. c. 89), § 30, tacitly allows notice of a trust to be entered upon the register of a company registered in Scotland under the Act, but the effect of the entry is left to be regulated by the common law.

[1] Smith and Campbell, 30 May, 1873, 11 M. 639; Cosens *v.* Stevenson, 26 June, 1873, 11 M. 761; Corbet *v.* Waddell, 13 Nov. 1879, 7 R. 200.

the marriage, however, if the liferenter, failing children, be likewise the fiar, he or she will be entitled to a conveyance of the fee, and so to terminate the liferent, unless express provision has been made to the contrary.[1]

If the interest of a beneficiary is restricted to an alimentary liferent, then as he has no power over the capital he cannot give any authority as to its investment.[2]

Liferent attachable if not made alimentary.

§ 144. If the liferents are not made alimentary, then the wife or husband or both may dispose of their interests. The liferent in such a case is like the interest of the heir in possession of an entailed estate. He cannot dispose of the fee, but he can assign his life interest, or if he becomes bankrupt, it will pass to the trustee for his creditors.[3]

Statutory restrictions on creation of liferents.

§ 145. While it is competent to create a liferent, alimentary or otherwise, it is to be remembered that this is subject to certain statutory limitations, the equivalent of the English rule against perpetuities.[4] This is regulated as respects heritable property by the Rutherfurd Act,[5] and as respects moveable property by the Entail Amendment Act, 1868.[6]

[1] Martin *v.* Bannatyne, 8 March, 1861, 23 D. 705; Park's Trustees *v.* Park, 14 March, 1890, 27 S. L. R. 528; Hawkes *v.* Hubback, L.R. 11 Eq. 5; *supra*, § 116.

[2] Sanders *v.* Sanders' Trustees, 7 Nov. 1879, 7 R. 157.

[3] Bell, *Com.* i. p. 50; ii. p. 178 (7th ed.); Wood *v.* Begbie, 7 June, 1850, 12 D. 963.

[4] As to perpetuities at common law, see Strathmore *v.* Strathmore, 1831, 5 W. and S. 170; Suttie *v.* Suttie's Trustees, 12 June, 1846, 18 Jur. 442. See also per Campbell, L.P., in Allardice *v.* Allardice, 5 March, 1795; Bell, Fo. Ca. 156; and in Newlands *v.* Newlands, 1798, 4 Paton, App. Ca. at p. 50 n. It was feared that the principle given effect to in this case might lead to a new form of entail by a series of liferents.

[5] 11 and 12 Victoria, c. 36, §§ 47-49, Appendix, p. 204.

[6] 31 and 32 Victoria, c. 84, § 17, Appendix, p. 208.

Rule as to moveable property.

§ 146. It is lawful to constitute or reserve by means of direct destination, trust or otherwise, a liferent interest in moveable estate in Scotland in favour only of a person in life at the date of the deed constituting or reserving the liferent.[1] For this purpose the date of any testamentary or *mortis causa* deed is the date of the death of the grantor, and the date of any contract of marriage is the date of the dissolution of the marriage.

If moveable property in Scotland is, by virtue of such a deed, dated after 31st July, 1868, held in liferent by or for behoof of a person of full age born after the date of the deed,—that is as regards testamentary deeds after the death of the grantor, and as regards contracts of marriage after the date of the dissolution of the marriage,—such property belongs absolutely to the liferenter, and he is entitled to have it made over to him absolutely.[2]

Liferent cannot be created in favour of one born after date of deed creating it.

§ 147. The result is that successive liferents of moveable property can only be created within very narrow limits, and that if a liferent is constituted by marriage contract in favour of one born after the dissolution of the marriage or by testamentary deed in favour of one born after the death of the testator—in either case not being *en ventre sa mère* at the time—it practically makes him fiar. Thus a testator may limit the interest of his children in his moveable succession to a liferent with fee to their issue; but if he attempts so to limit the interest of grandchildren, or of nephews or nieces, it may result in making some of them fiars.

[1] In the case of Lady Dick's settlement, all her property was vested in trustees, and her jewels deposited in a strong box for the use and ornament of her posterity to the tenth generation, and then to her nearest in kin, 5 W. and S., 187 n.

[2] 31 and 32 Victoria, c. 84, § 17, Appendix, p. 208.

Rule as to heritable property.

§ 148. The rule as regards heritable property is still more restrictive. The regulations affecting land are in terms the same as those affecting moveables, but there is no definition in the Rutherfurd Act, as there is in the Entail Amendment Act, 1868, of what is to be held as the date of the deed constituting a liferent. This, in the case of testamentary deeds, would in ordinary circumstances be the date of the death of the testator;[1] but it would seem that in construing the former statute the word "dated" means "bearing date,"[2] and therefore, both in the case of a marriage contract and of a testamentary deed, its date will be held to be the actual date of the deed.

Interest of heir of marriage cannot be restricted to liferent by marriage contract.

§ 149. The consequence is that it is competent to grant a liferent of land in favour only of a person in life at the date of execution of the deed making the grant; and if, in virtue of a deed, land is held in liferent by a person of full age born after the date of the deed, he is not affected by the limitations restricting his right to a liferent, but is entitled to become the fee simple proprietor. Hence it is impossible by ante-nuptial deed to limit the interest of the heir of the marriage to a liferent, except during his minority. He must be fiar. The period of vesting may, however, be postponed, provided the arrangement does not in effect constitute a liferent, or does not contravene the law as to accumulations to be immediately referred to.

The statute apparently deals only with the case of a liferent constituted by direct conveyance, and not with the case of a liferent of land, the legal title to which is vested in trustees, but it is very doubtful whether this case is not likewise intended to be and is not struck at.

[1] See Black v. Auld, 5 Nov. 1873, 1 R. 133.

[2] Riddell, Petitioner, 6 Feb. 1874, 1 R. 462; Riddell v. Lord Polwarth, 24 June, 1876, 3 R. 879.

§ 150. The English rule is that lands cannot be tied up or determined as to their future destination for a longer period than the lives of existing persons and a term of twenty-one years after their decease. The Scotch statutory rule was perhaps intended to be the same, but as will be observed, there is an important difference between them. In England, the interest of a person unborn at the date of the deed may be restricted for twenty-one years after the death of a then existing person: in Scotland, a life interest to a person unborn at the date of the deed cannot be granted for longer than twenty-one years from the date of his own birth. Comparison of English and Scotch rules.

In England the period is computed from the date or delivery of the deed creating the limitation, or from the testator's death when given by will, that being the time at which a will takes effect.

§ 151. In this connection the Thellusson Act should be kept in view. Peter Thellusson, by his will dated 2nd April, 1796, directed his personal property to be invested in land, and the rents and profits of that land and of his other real estate, to be accumulated during the lives of all his children, grandchildren, and great grandchildren who were living at the time of his death, for the benefit of certain of his future descendants to be living at the decease of the last survivor. The property consisted of land in England worth above £4,500 a year, some real estates in the West Indies, and personalty estimated at above £600,000; it was calculated that the fund might probably reach £100,000,000 before it would be enjoyed, and it was said that in thirty years, which was the lowest period that could be looked forward to for accumulation, it would amount to about £19,000,000. The Peter Thellusson's Will.

testator's object was to create enormous wealth for the purpose of founding three families to spring from his three sons. The will was upheld after sixty years of litigation, which only ended in 1858,[1] but the fund under the management of the Court of Chancery turned out to be much smaller than was anticipated, and was distributed amongst a greater number of claimants.[2]

The Thellusson Act.

§ 152. To prevent the repetition of such an attempt, an Act[3] was passed, on the suggestion of Lord Loughborough, in the year 1800, which forbids the accumulation of income of real or personal property for any larger term than—

(*a*) The life of the grantor or settlor, or

(*b*) Twenty-one years from the death of the grantor, settlor, devisor, or testator, or

(*c*) During the minority of any person living, or in *ventre sa mère* at the death of the grantor, devisor, or testator, or

(*d*) During the minority of any person who, under the settlement or will, would for the time being, if of full age, be entitled to the income so directed to be accumulated.

Applied to moveable estate in Scotland from its date.

§ 153. The Act applied to moveable property in Scotland

[1] Thellusson *v.* Woodford, 4 Ves. 227, 11 Ves. 112; Oddie *v.* Woodford, 3 M. and C. 584; Thellusson *v.* Roberts, 5 Jur. N.S. 1031; Thellusson *v.* Rendlesham, 7 H. L. Ca. 429; 3 and 4 Will. IV. c. xxvii.

[2] At the end of thirty-three years there was practically no increase on the fund. See per Lord Brougham in Strathmore *v.* Strathmore, 1831, 5 W. and S. at p. 192. The accumulation of capital between 1802 and 1833 amounted to £326,364 1s. 3d.; the costs paid by the trustees to £122,729 16s. 4d.; besides which the individual litigants had incurred large costs. Hargrave, *Treatise on the Thellusson Act* p. 13 *et seqq.* (London, 1843.)

[3] 39 and 40 Geo. III. c. 98. Appendix, p. 201.

from the date of its passing,[1] but heritable property in Scotland was expressly excepted from its operation. In 1848, however, the exception was repealed, and the Act was declared in future to apply to heritable property likewise.[2] To heritage since 1848.

The Act therefore does not apply to trusts of heritage in existence prior to 14th August, 1848, so that rents of heritable property may be the subject of accumulation, under trusts then existing, for a period exceeding twenty-one years.[3]

§ 154. While provisions made by a husband in favour of his wife and children may be good against his creditors, as will presently be explained, he cannot make a provision for himself which will have the same result. A husband may by ante-nuptial contract come under an obligation to pay his wife an alimentary annuity during the marriage, and this will be good against his creditors, and will enable her to rank along with them in the event of his sequestration:[4] or if property has been set apart to meet it, to retain it preferably.[5] A man cannot, however, by marriage contract, ante-nuptial or post-nuptial, by deed of entail, trust disposition, or any other deed, settle any part of his property so as to take No one can constitute a liferent in his own favour to the exclusion of his creditors.

[1] The Act extends both to real and personal property, but the exception applies to heritable property in Scotland only, so that moveable property in Scotland necessarily fell under its operation. See per Lord Brougham in Strathmore *v.* Strathmore, 1831, 5 W. and S., at p. 193. Hargrave, *Treatise on the Thellusson Act*, p. 209.

[2] The Rutherfurd Act, 11 and 12 Vict. c. 36, § 41, Appendix, p. 204.

[3] Keith's Trustees *v.* Keith, 17 July, 1857, 19 D. 1040, and Interlocutor at p. 1071; M'Larty's Trustees *v.* M'Laverty, 23 Jan. 1864, 2 M. 489; Appendix, p. 205.

[4] Muirhead *v.* Miller, 19 July, 1877, 4 R. 1139; Stair, 1. 4. 9 and 17; Forbes, *Institutes of the Law of Scotland*, i. p. 64; Menzies, *Lectures*, p. 446 (3rd edition).

[5] Grant *v.* Robertson, 15 June, 1872, 10 M. 804, as regards the £1,000 there mentioned.

a liferent therein determinable or defeasible upon his sequestration, or so as in any way to reserve the income to himself and place it beyond the reach of his creditors.[1] In other words a husband cannot create an alimentary annuity in his own favour. If he does he can recall it.[2] "No man," says Lord O'Hagan,[3] "is permitted to filch his own income from the hands of his creditors."[4] On sequestration any such provision passes to the trustee, and will be realized by him for the creditors.[5] This is a principle which is to be kept carefully in view, as it is often overlooked, and many a family has had a rude awakening, when on the husband's bankruptcy a fund which he had set aside

[1] MacKenzie's Creditors *v.* Mackenzie (Redcastle Case), 1792, Bell's 8vo Cases, p. 404; Wood *v.* Begbie, 7 June, 1850, 12 D. 963; Ker's Trustee *v.* Justice, 7 Nov. 1866, 5 M. 4; Learmonth *v.* Miller, 2d App. 1875, L.R. 2 Sc. App. 439, S.C. 2 R. (H. of L) 62; Forrest *v.* Robertson's Trustees, 27 Oct. 1876, 4 R. 22.

As to Entail, see Bell, *Pr.* § 1747 (3).

The case of a settlement, *e.g.* by entail made in respect of a payment in money or other remuneratory consideration is of course different. Stewart *v.* Agnew, 1822, 1 Sh. App. 320. Per Lord Brougham in Dickson *v.* Cuninghame, 1831, 5 W. and S. at p. 696.

The English law is the same. Higinbotham *v.* Holme, 19 Ves. 88; Gilchrist *v.* Cator, 1 De G. and S. 188; *In re* Pearson, *Ex parte* Stephens, L.R. 3 Ch. D. 807. Vaizey, *Law of Settlements of Property*, ii. p. 951; Campbell, *Law relating to the Sale of Goods*, p. 81.

[2] Hamilton's Trustees *v.* Hamilton, 9 July, 1879, 6 R. 1216.

[3] In Learmonth *v.* Miller, *supra*, at p. 445. See also per Lord Brougham in Dickson *v.* Cuninghame, 1831, 5 W. and S. at p. 693.

[4] The rule is not confined to the case of family provisions, but is general. *Ex parte* Barter, *Ex parte* Black, *In re* Walker, L.R. 26 Ch. D. 510.

[5] In England the case of a married woman is allowed as an exception to this rule. A restriction upon anticipation—the counter part of the Scotch declaration that a provision is alimentary—has been held as valid when imposed by the married woman herself as when imposed by a stranger. Buckton *v.* Hay, L.R. 11 Ch. D. at p. 648; Clive *v.* Carew, 1 J. and H. 199; Arnold *v.* Woodhams, L.R. 16 Eq. at p. 33. See Gordon *v.* Murray, 9 Feb. 1833, 11 S. 368.

by ante-nuptial contract for the maintenance of his family, but made payable to himself, has been suddenly snatched away.[1]

Life interest till bankruptcy or alienation.

§ 155. To meet this difficulty, it has long been the practice in England, and is now becoming the practice in Scotland,[2] to provide in ante-nuptial contracts that the income of property brought into settlement by the husband shall only be payable to him "during his lifetime or till he shall become bankrupt, or shall assign, charge, or encumber it, or shall do or suffer something whereby the same or some part thereof would, through his act or default, or by operation or process of law, if belonging absolutely to him, become vested in or payable to some other person, and that from and after the determination of that trust the income is to be paid to" some other person, *e.g.* his wife or children; or generally to be dealt with as if he were dead.[3] It is settled in England that this device is valid. The husband's creditors cannot touch the income of property brought into settlement by him, if the alienation or charge has taken place, either by his voluntary acts or by involuntary alienation by operation of law, in favour of a particular creditor before the commencement of bankruptcy.[4] If the

[1] Wood *v.* Begbie, 7 June, 1850, 12 D. 963.

[2] The form of clause given in the Juridical Styles, i. pp. 214, 226 (5th ed., 1881), would be ineffectual. It simply amounts to a declaration by the husband himself that the creditors are not to take the liferent he has set aside for himself.

[3] Lewin, *Law of Trusts*, p. 104 (8th ed., 1885), Williams; *Law of Real Property*, p. 95 (ed. 1880); Robson, *Law of Bankruptcy*, pp. 437, 439 (6th ed.); Yate-Lee and Wace, *Law of Bankruptcy*, p. 342 *et seqq.* (1884); Baldwin, *Law of Bankruptcy*, p. 205 (6th ed., 1890).

[4] Detmold *v.* Detmold, 1889, L.R. 40 Ch. D. 585; Knight *v.* Browne, 7 Jur. (N. S.) 894. It is different in the case of a post-nuptial settlement—such an arrangement is there held to be fraudulent within the meaning of the Statutes of Elizabeth. See *In re* Pearson, *ex parte* Stephens, 1876, L.R. 3 Ch. D. 807.

husband has made no attempt to alienate, and the determination of his interest is caused solely by his being adjudicated bankrupt, the scheme will fail.[1] It is different when the property did not originally belong to the husband himself. If it came from the wife or from a stranger—and in this connection any one, *e.g.* his father, will be a stranger—and is settled in the above terms, the clause will be effectual in the case of bankruptcy and against creditors generally.[2]

Husband's property may be settled upon him till alienation.

§ 156. The result is that the income of the whole property brought into settlement can be effectually settled upon the husband till he attempts to *alienate* it; and that the income of the whole of that property, except what originally belonged to him, can be settled on him *till* his bankruptcy. The life interest of the husband in the whole of the property can therefore be made inalienable, and his life interest in the whole of the property, except that which originally belonged to him, can be secured as against his trustee in bankruptcy.

Other property till his bankruptcy.

Effect of clause in Scotland.

§ 157. The point has not arisen for judicial determination in Scotland in reference to property originally belonging to the husband; but such a clause in a contract of marriage will protect income arising from the wife's property, and payable to the husband;[3] and a clause of the same character in a testamentary deed will protect a bequest against creditors.[4] In that case it is a condition attached to a gift

[1] Authorities, p. 119, note[3]; Vaizey, *Law of Settlements of Property*, ii. pp. 947, 951; Bythewood and Jarman, *Precedents in Conveyancing*, vi. p. 285 (4th ed., 1890).

[2] Davidson, *Precedents in Conveyancing*, iii. p. 123; Jarman, *Treatise on Wills*, ii. p. 30 (4th ed., 1881).

[3] Campbell *v.* Clinton, 22 June, 1866, 4 M. 858. Cf. Corbet *v.* Waddell, 13 Nov. 1879, 7 R. 200.

[4] Trappes *v.* Meredith, 3 Nov. 1871, 10 M. 38. This case is reported

by a third person, and is therefore in a different position from a provision by one in his own favour.

In the days when it was held that *jus mariti* and right of administration could not be excluded by the husband's own act, it was conceded that they could be defeated in a deed of gift by a third person to a married woman, by inserting a clause providing that if the husband claimed the property, it should return to the donor.[1] Later, a donor provided that the *jus mariti* and right of administration should be forfeited if the donee's husband became insolvent; the husband did so, and the Court held that his rights had been effectually excluded.[2] In Scotland as in England forfeiture of a life interest upon re-marriage is recognized and given effect to. The liferent is given until the occurrence of a certain event, when it is to terminate.

in England, L.R. 10. Eq. 604, 7 Ch. App. 248. Kirkland *v.* Kirkland's Trustee, 18 March, 1886, 13 R. 798; Jamieson *v.* Hoile, p. 122, note [2].

[1] See Nicolson *v.* Inglis, 1678, M. 5834.

[2] Annand *v.* Chessels, 4 March, 1774, M. 5844, affd. H. of L., 2 Pat. 369. Here the creditors pleaded that "an eventual exclusion of the *jus mariti*, in case of insolvency, is an unfair device, calculated to ensnare creditors, and to defraud them of their just rights." But Lord Mansfield, who gave judgment in the appeal, paid no attention to the argument.

A clause of forfeiture on bankruptcy, it will be remembered, is common in leases, and is binding upon the tenants' creditors. They can only take what the bankrupt himself had. It is also common in partnership contracts.

There was an arrangement not uncommon in Scotland in the marriage contracts of the seventeenth century, not unlike that under consideration, which provided that if by captions, apprisings, or civil distress, the husband should not be able to live peaceably with the wife, and entertain her, she should, with his concourse, have right to certain lands for entertainment of herself and family. The clause came before the Commissioners of Justice during the Commonwealth, but its precise effect was not determined. Gordon *v.* Gregory, 1658, *Decisions of the English Judges*, p. 129.

Principle upon which the rule depends.

§ 158. The English doctrine, no doubt, depends upon certain technical reasons which, in terms, do not apply in Scotland, but the rule itself and the considerations which underlie it are perfectly consonant with the principles of our law. The rule in England is founded upon the doctrine of conditional limitation, as distinguished from a gift subject to a condition, but this it is unnecessary to discuss.[1] What is of the essence of the arrangement is that the gift is not of fee but of liferent only, and is to cease upon the occurrence of a certain event, and in that case to pass to another.

A similar arrangement probably effectual in Scotland.

§ 159. A similar condition would seem to be valid in Scotland to the same extent as in England.[2] As the fund itself is vested in trustees, the beneficiary's right is limited to a claim against them, and he cannot go beyond the limitations of the deed which creates the claim. On the occurrence of a certain event his right determines and a *jus crediti* in another emerges. "A man cannot," says Lord Moncrieff, L.J.C., "put his property out of his power, and beyond the reach of his creditors, without constituting at the same time some right, direct or contingent, in regard to that property in another."[3] The marriage is valuable consideration for the contingent right conferred upon the wife and children. As expressed in England, they are purchasers for value.[4] The principle is the same as

[1] The subject is lucidly explained by Fry, J., in Dugdale *v.* Dugdale, L.R. 38 Ch. D. 176. As to the difference between the law of England and of Scotland in reference to conditional limitations, see Barstow *v.* Black, 1868, L.R. 1 Sc. App. 392.

[2] See Jamieson *v.* Hoile, 30 Oct. 1890, 28 S.L.R. 51.

[3] Hamilton's Trustees *v.* Hamilton, 9 July, 1879, 6 R. at p. 1221. See per Lord Eskgrove and Lord Braxfield in Dickson *v.* Cuninghame, 1786, 5 W. and S. at pp. 662, 663.

[4] Lewin, *Law of Trusts*, p. 104 (8th ed.). Per Lord Westbury in Leslie *v.* Macleod, 1870, L.R. 2 Sc. App. at p. 49; 8 M. (H.L.) at p. 107.

was applied in the case of entails prior to the Act of 1685, with this difference, that in the case of entail the land was actually vested in the person to be affected by the limitation, while in the case of a marriage contract the corpus of the property is vested in third persons, and the beneficiary's right is a personal claim only against them.

Question whether alienation has taken place.

§ 160. It is sometimes a question whether under such a clause alienation has taken place; and it has been settled in Scotland, in a case on an English settlement, that arrestment not followed by furthcoming is not an alienation, and does not work a forfeiture.[1]

Discretionary trust for application of income.

§ 161. Another method of protecting the income of a marriage contract trust during the husband's lifetime, in the event of his insolvency, is to give the trustees discretionary power in its application. But the effect of the deed must not be an appropriation of the property for his benefit.[2] If so, it really remains his, and so liable to the diligence of his creditors. It is necessary that he should part with his whole interest. Thus, in an English settlement, trustees were directed "to pay, apply, lay out, and expend the

[1] Campbell *v.* Clinton, 22 June, 1866, 4 M. 858.

In re James, Clutterbuck *v.* James, (6 *The Times*, L.R. 240; W. N. (1890) 66), the question arose as to the effect of the Scotch sequestration of a person who had right, under a will, to certain income subject to defeasance on bankruptcy. Sequestration was awarded, but at the first meeting of creditors it was resolved that the estate ought to be wound up under a deed of arrangement. No trustee was elected, and the sequestration was recalled. The Lord Advocate (Robertson) having given an opinion that in these circumstances the estate had not vested in another person than the person who had been sequestrated, and that he was the proper person to give a discharge for the income both before and after the sequestration, the Court of Chancery held that the defeasance clause had not come into operation. See Metcalfe *v.* Metcalfe, L.R. 43 Ch. D. 633.

[2] Snowdon *v.* Dales, 6 Sim. 524; Wood *v.* Begbie, 7 June, 1850, 12 D. 963.

dividends or annual produce of a certain sum in and towards the maintenance, clothing, lodging, and support of A.B. and his present or any future wife, and his children *or any of them*, or otherwise for their or any of their use and benefit, in such manner as the trustees for the time being should in their or his uncontrolled discretion think proper." In that case, it was held that if the trustees, in exercise of their discretion, chose to pay the income to the wife and children, the husband took no actual interest under the trust, and there was nothing which the assignee for his creditors could attach.[1] A similar result has been arrived at in Scotland.[2]

Under this arrangement bankrupt can demand nothing, and there is therefore nothing for creditors to take.

§ 162. In the Scotch cases the provision was made by a third person. In the English case, although the settled fund belonged to the husband, the settlement was for valuable consideration given by a third person. It was, however, post-nuptial. The ground upon which the arrangement is defensible is that the husband has parted absolutely with his property, and, as a gift by ante-nuptial deed to his wife and children would be good against his creditors, so an exclusive power of selection conferred upon the marriage contract trustees would be good. If so, the trustee for the creditors would take the provision only *tantum et tale* as it stood vested in the bankrupt, and subject to all the conditions and qualities legally attaching to it. He could only take what the marriage contract trustees chose to pay to the bankrupt, which could be limited to a bare subsistence.[3] If, says Lord O'Hagan, the debtor "have a vested property and an absolute claim,

[1] Holmes *v.* Penney, 1856, 3 K. and J. 90; 26 L.J. (Ch.) 179; 5 W.R. 132. Form of clause, Key and Elphinstone's *Precedents*, ii. 456 (ed. 1890).

[2] Hunter *v.* Hunter's Trustees, 10 March, 1848, 10 D. 922; Trappes *v.* Meredith, *supra*, § 157.

[3] Trappes *v.* Meredith, *supra*, § 157.

they will of course pass from him, but if the property and the claims are subject to conditions and liable to be affected by the discretionary action of other people, the creditor cannot escape the fulfilment of the conditions or deny the effect of that exercise of the discretion which would have bound the debtor." [1]

Making persons beyond the family objects of the power.

§ 163. The payment of the income to the wife and children will as a rule give the enjoyment of it to the husband, and will protect him in the case of bankruptcy so long as wife or children live. Failing them, then there is no one to whom the trustees can pay except the husband, and if he is bankrupt, the income will therefore pass to his creditors. This might be avoided by enlarging the class of objects to whom the trustees may pay the income, but collaterals might not feel it so incumbent upon them to provide for a bankrupt as his own wife or children would.

Protection by giving first liferent to wife.

§ 164. The income of the husband's estate may also be protected during the subsistence of the marriage by giving the first liferent to the wife for her liferent alimentary use, exclusive of the husband's rights, instead of to the husband himself. This plan is, however, not very often resorted to.[2]

Alimentary liferent may be given to husband by his wife or by a stranger.

§ 165. While a husband cannot set apart any of his property to provide an alimentary annuity to himself, this can be done effectually by a third person. A father, for instance, may in his son's marriage contract settle a sum for his alimentary use; and a wife's estate may be settled for the alimentary use of the husband.[3] This will be safe from

[1] Chambers *v.* Smith, 1878, L.R. 3 App. Ca. at p. 808; S.C. 5 R. (H. of L.) at p. 157.

[2] A clause is given in the *Juridical Styles*, i. pp. 213, 214 (5th ed.), from a draft prepared in England. As to other parts of this clause, see *supra*, § 155, note 2.

[3] M'Donell *v.* Clark, 25 Nov. 1819, F. C.

creditors—except alimentary creditors[1]—and will not pass to the trustee in sequestration, even for behoof of alimentary creditors.[2] This rests upon the principle that one who gives money or property is entitled to attach any conditions he pleases to it.

Discretionary power to trustees to restrict children's provisions to a liferent.

§ 166. Now that testamentary as well as marriage contract arrangements are generally carried out by means of a trust, it is common to confer discretionary powers upon trustees both under will and marriage contract, to deal with the provisions made for children.[3] The object is to protect their interests against their own imprudence and against the claims of their creditors if, in the opinion of the trustees, such a course is expedient. This is done by an enabling clause somewhat to the following effect :—

"That, notwithstanding the period for the vesting and payment of the said provisions, the trustees shall have the power, if they see cause and deem it fit, before actual payment is made :—

1. To postpone the payment, or the vesting and payment of the said provisions, in whole or in part, in the case of all or any of the children of the marriage or their issue for such time as they may in their discretion think proper, and during such interval

(*a*) To apply the income for behoof of, or,

(*b*) To pay the same to, such child or children, or issue ; or,

2. By a writing under their hands (*a*) To retain the said provisions vested in their own persons, or,

(*b*) To vest the same (i) in the persons of other trustees, whom they are hereby authorized to appoint, with all or any of the powers, discretions, privileges, and exemptions conferred on themselves, or with such other and additional powers and discretions as they may deem necessary, or (ii) in any trustees

[1] Earl of Buchan *v.* His Creditors, 11 July, 1835, 13 S. 1112.

[2] Corbet *v.* Waddell, 13 Nov. 1879, 7 R. 200 ; Lewis *v.* Anstruther, 1852, 15 D. 260.

[3] M'Laren, *Wills and Succession*, ii. p. 595 ; Davidson, *Precedents in Conveyancing*, iii. pp. 130, 973 ; Vaizey, *Law of Settlements of Property*, ii. p. 965 ; Lewin, *Law of Trusts*, p. 100 (8th ed.).

of whom they approve, appointed under the marriage contract of any such child, or the issue of a child, of the terms and conditions of which they approve,

so that the children of the marriage or any of them, or their issue, as the case may be, may enjoy or receive the *income* only of their respective provisions during their lives, or for such time as the trustees may fix, as an alimentary allowance, not assignable by them, and not affectable by their debts or deeds or by the diligence of the creditors of such child or issue whose share is so dealt with; and that the *capital* may be settled on or for behoof of the issue of each such beneficiary whose share is so dealt with, in such proportions, payable at such age and subject to such conditions, and under such restrictions and limitations as such beneficiary may appoint by any writing, either *inter vivos* or *mortis causa*, under his or her hand, which failing, equally amongst such issue if more than one, and failing issue of any such beneficiary, then for behoof of such person or persons or for such purposes as such beneficiary may appoint by any such writing, which also failing, for behoof of such beneficiary's nearest heirs in moveables, including therein the persons entitled to take, in virtue of the Act 18 Victoria, c. 23, commonly called the Intestate Moveable Succession Act, 1855, or any statutory modification thereof."

Statutory restrictions.

§ 167. In drafting such a clause, and in executing the powers granted, the restrictions upon the creation of liferents and the law against accumulations, already explained, must be kept in view. In so far as concerns unconverted heritage, the restriction to a liferent would be ineffectual in an antenuptial contract of marriage.[1]

Execution of power by trustees.

§ 168. So long as actual payment has not been made trustees with a power such as this may exercise the discretion conferred upon them. While any part of the fund remains in their hands they are bound to employ it as they think best for the beneficiary's benefit. They may either pay it, at any time they think fit, to the beneficiary, or they may retain it and pay him the income, or apply it for his behoof as long as they think proper, or they may settle it on himself in

[1] *Supra*, § 148.

liferent and his children or appointees and heirs in fee. While the money is in the trustees' hands, whether they have executed another deed or not, it is effectually protected against the diligence of creditors, even although vesting has taken place; and if the beneficiary is sequestrated the trustee for his creditors cannot touch it. The latter takes only *tantum et tale* as the right stood in the person of the beneficiary; and the trustees under the marriage contract can execute any deed that may be necessary notwithstanding the sequestration.[1]

Trustees cannot divest themselves of the power.

§ 169. The vesting of a fee subject to defeasance on the occurrence of a specified event is a common artifice in conveyancing, and is recognized and approved of by the courts.[2]

A power such as this is one that trustees cannot divest themselves of. It does not lapse by non-exercise, and may be executed by a surviving trustee.[3]

Restriction of alimentary provisions.

§ 170. Alimentary provisions must, however, be alimentary and no more, and the Court will, if necessary, restrict an alimentary provision to such a sum as may be deemed reasonable, and will allow the rest to be attached notwithstanding any declaration in the deed by which it is granted.[4]

[1] Chambers *v.* Smith, L.R. 3 App. Ca. 795; S.C. 5 R. H.L. 151. See also Cheyne & Stuart *v.* Irving Smith, 26 Feb. 1889, 26 S.L.R. 391; Craig *v.* Ferguson and others, 3 July, 1884, 11 R. 1038.

[2] Robertson and others, 20 July, 1869, 7 M. 1114; Haldane's Trustees *v.* Murphy, 15 Dec. 1881, 9 R. 269; commented on in Hood *v.* Murray, L.R. 14 App. Ca. 124. Taylor *v.* Gilbert's Trustees, 1878, L.R. 3 App. Ca. 1287, S.C. 5 R. H.L. 217; Fraser *v.* Fraser's Trustee, 27 Nov. 1883, 11 R. 196; Bradford *v.* Young, 19 July, 1884, 11 R. 1135.

[3] See per Cranworth, L.C., in Weller *v.* Ker, 1866, L.R. 1 Sc. App. 14; Lewin, *Law of Trusts*, p. 615 (8th ed. 1885); cf. Muir *v.* Pollock, 9 Dec. 1851, 14 D. 152.

[4] Webster *v.* Schaw, 7 July, 1826, 4 S. 809. See per Inglis, L.P., in Livingstone *v.* Livingstone, 5 Nov. 1886, 14 R. at p. 46; Stair, 3. 1. 37.

Each case is one of circumstances. In 1840, £1,800 a year was allowed to a peer;[1] in 1886, an alimentary liferent of £875 a year, payable to the second son of a landed proprietor, was restricted by the Court to £500 a year.[2] In giving his opinion in this case, Lord Shand adverted to the plan of barring creditors' claims to the surplus by means of a clause of forfeiture on bankruptcy, which he seemed to think would be effectual.

[1] Harvey *v* Calder, 13 June, 1840, 2 D. 1095.

[2] Livingstone *v.* Livingstone, *supra*, 14 R. at p. 43. For other examples, see Webster *v.* Schaw, *supra;* Edmonstone *v.* Kirkcaldy, 1622, M. 10365; Lewis *v.* Anstruther, 17 Dec. 1852, 15 D. 260; Bell *v.* Innes, 29 May, 1855, 17 D. 778; Rogerson *v.* Rogerson's Trustee, 6 Nov. 1885, 13 R. 154.

CHAPTER VI.

THE EFFECT OF BANKRUPTCY UPON THE PROPERTY OF MARRIED PERSONS AND UPON CONVENTIONAL PROVISIONS FOR MARRIED PERSONS AND THEIR CHILDREN.

Transfer of a bankrupt's property to trustee in sequestration.

§ 171. By the Act and Warrant of Confirmation, the whole of the estates and effects—so far as attachable for debt[1]—heritable and moveable, and real and personal, wherever situated, of one who has been sequestrated, under the bankruptcy statutes, is transferred and belongs to the trustee, for behoof of the creditors, and the trustee has full right and power to sue for and recover all estates, effects, debts,

[1] These words, which are of much importance, are not repeated in the act and warrant, but are in the statute itself (19 and 20 Vict. c. 79, § 102). Speaking of the previous statute, Lord Deas says, "The enactment transferring the estate to the trustee 'so far as attachable for debt,' I have always looked upon as descriptive of the estate transferred, and not, as my brother Lord Curriehill seems to hold, descriptive of the consequences or effects of that transference. The bankrupt may be proprietor (so we term him) of an entailed estate, and of heir-loom moveables entailed along with it. He may be in possession (which usually presumes property) of corporeal moveables, of which he is truly only a liferenter. He may have body clothes which no creditor would be entitled to strip from his back. In short, the trustee is to take only the estate which a creditor could attach." Littlejohn *v.* Black, 13 Dec. 1855, 18 D. at p. 227. See also per Inglis, L.P., in Kirkland *v.* Kirkland's Trustee, 18 March, 1886, 13 R. 798; and Lord Westbury in Fleeming *v.* Howden, 1868, L.R. 1 Sc. App. 372.

and moneys belonging to the bankrupt.[1] There is thus vested in the trustee not only all the property but all the rights of the bankrupt, accrued at the date of the sequestration, or which may accrue to him before his discharge.[2]

Revocation of deeds.

The right to revoke a deed or a gift, therefore, passes to the trustee, and whatever the bankrupt could have revoked, the trustee is bound to revoke in the interest of the creditors.[3] In addition, certain transactions are challengeable by the creditors of a bankrupt which he could not himself have challenged, and the trustee as representing the creditors is vested with all their rights. While the trustee, then, is general assignee of the bankrupt, and takes all his property and rights, he is not bound by all his deeds or obligations, but is on the contrary entitled to challenge and set them aside, if they infringe certain legal rights of the general body of creditors.

Challenge of certain transactions.

Transfer of wife's property to husband's creditors under the old law.

§ 172. While the *jus mariti* and right of administration remained entire, the wife's moveable property, including the income of her heritage during the marriage, passed, as we have seen, to the husband as *dominus omnium rerum stante matrimonio*.[4] Upon the sequestration of the husband,[5] therefore, this property vested and still vests where the old law applies,[6] in the trustee for behoof of his creditors. So

[1] Bankruptcy (Scotland) Act, 1856, § 102 and Schedule D.

[2] See M'Donald *v.* M'Grigor, 10 March, 1874, 1 R. 817.

[3] See for instance Kemp *v.* Napier, 1 Feb. 1842, 4 D. 558.

[4] See *supra*, § 7. The phrase occurs as early as 1579, Lenox *v.* Lovat, M. 5877. See also M. pp. 5802, 5804, 10,366. Maxwell *v.* Maxwell, 1656, *Decisions of the English Judges*, p. 37. Peter *contra* ——, 1657, *ib.* p. 51.

[5] On the continent a *separatio bonorum* was and is allowed where the husband's affairs go wrong; but this was never the rule in Scotland. See Turnbull, 1709, M. 5895.

[6] That is, as regards moveables acquired or the rents of heritage vested prior to 18th July, 1881, and as regards moveables or the rents

much was it the practice to look to the wife's property, for payment of the husband's debts, that a clause in a marriage contract attempting to exclude the *jus mariti* was regarded as a fraudulent contrivance to cut off the husband's creditors. To take away "participation of condition betwixt man and wife is the way to open a door to all fraud, so that none can contract with a married man."[1] One of the ingenious devices resorted to in order to induce Scotsmen to turn Episcopalians was the Act 1672, c. 9, which provided that any persons married by a minister not episcopally ordained "shall amit and lose any right or interest they may have by that marriage, *jure mariti vel jure relictæ*." This has the appearance of creating separate estate, but such was not the intention. It was held that the result was to work a forfeiture in favour of the Crown, because if the wife's estate was to belong to her, exclusive of the *jus mariti*, the husband's creditors might easily be cheated by his marrying irregularly,[2] and so they would have no right to the wife's property.

Child's property never passed to husband's creditors.

§ 173. A child's property never did, and does not now, become the property of his father. If a child's money is in his father's hands mingled with his own at the date of the sequestration, it will pass to the trustee, but the same thing applies in the case of a third person. Both child and third

of heritage, acquired by the wife after that date, if she was married prior thereto, and the husband has by irrevocable deed made a reasonable provision for her, or the parties have not come under the provisions of the Married Women's Property Act, by deed registered and advertised; see Henderson *v.* Henderson, 25 Oct. 1889, 17 R. 18.

[1] Campbell *v.* Sandilands, 1682, M. 5836; Gordon *v.* Gregory, 1658, *Decisions of the English Judges*, p. 129.

[2] 1672, c. 9 (c. 20, ed. Thomson); Sir George Mackenzie's *Observations*, 2 Parl. Chas II. Sess. 3, Act 9.

person will be personal creditors for the amounts so lost, and can rank for them in the sequestration.

Wife may be creditor of her husband.

§ 174. When, under the old law, the husband's *jus mariti* was excluded and the wife had a separate estate, she could enter into a contract with her husband,[1] and this power is specially saved by the Married Women's Property Act, although perhaps it does not extend to a contract of a personal character such as partnership.[2] She could and can still become his creditor, in the same way as one of her children or a stranger could do,[3] and an action will lie at the instance of a wife against her husband, or of a husband against his wife. If he sells corporeal moveables belonging to her as separate estate, as being *paraphernalia* or shares from which his *jus mariti* is excluded, she can rank for the price along with his other creditors.[4] If his stock in trade has been enhanced in value by her exertions, she can claim on his estate for the amount thereof.[5]

Protection of wife's property under Married Women's Property Act.

§ 175. Since the passing of the Married Women's Property Act no part of the moveable estate of a wife—provided it is kept separate and distinguishable—is affected by the bankruptcy of her husband if she was married after 18th June, 1881; and only what was acquired prior to that date if she was married earlier, and has not come under the Act

[1] Davidson *v.* Davidson, 28 March, 1867, 5 M. 710; Montgomery *v.* Hart, 17 July, 1845, 7 D. 1081.

[2] Macara *v.* Wilson, 15 Feb. 1848, 10 D. 708. *Supra*, § 101.

[3] Williams *v.* Williams, 15 Nov. 1844, 7 D. 110; Laidlaw *v.* Laidlaw's Tr., 16 Dec. 1882, 10 R. 374; Shaw's Trustees *v.* Shaw, 19 Jan. 1870, 8 M. 419; Robertson *v.* Robertson, 10 Feb. 1835, 13 S. 442, affirmed H.L. 7 W. and S. 526

[4] Montgomery *v.* Hart, *supra;* Meldrum *v.* Wilson, 7 Dec. 1842, 15 Sc. Jur. 90.

[5] Per Lord Shand in Ferguson's Trustee *v.* Willis, Nelson, & Co., 11 Dec. 1883, 11 R. at p. 272.

New regulation if when wife has lent her property to husband he becomes bankrupt.

by deed,[1] unless she has lent or entrusted it to him or commixed it with his funds. If she has done so it is to be treated as assets of the husband's estate in bankruptcy, but with right to her to claim the value thereof as a creditor after the other onerous creditors have been paid.[2] This is a novel principle in Scotland, as hitherto a wife, although she cannot vote in the election of a trustee upon her husband's sequestrated estate,[3] has been allowed to claim and rank with the other creditors for any proper debt due by her husband to her—*e.g.* a loan of money from her separate estate.[4] The new rule seems to be founded upon the English bankrupt law, and places the wife very much in the position of a partner with her husband as under the law of England;[5]

[1] *Supra*, § 95; or unless the husband has by irrevocable deed, executed prior to 18 July, 1881, made a reasonable provision for his wife in the event of her surviving him.

[2] See, in reference to similar words in Bovill's Act, *Ex parte* District Bank, L.R. 16 Q. B. D. 700; *Ex parte* Taylor *re* Grason, L.R. 12 Ch. D. 366. As to the clause in the Married Women's Property Act, see Hunter *v.* Crawford, 25 March, 1885 (Sheriff Court of Glasgow), 1 Sh. Co. Rep. 241; the English Act does not oust any common law remedies the wife may have. *In re* May, Crawford *v.* May, 63 L.T. 375; 6 *The Times*, L.R. 461.

[3] The Bankruptcy (Scotland) Act, 1856, § 56.

[4] It has been held in England that before the Married Women's Property Act, 1882, a wife could prove in competition with other creditors, and that the Act does not apply to a loan made before its date. *Ex parte* Home, 54 L.T. 301: See Slanning *v.* Style, 3 P. Wm. 337; Woodward *v.* Woodward, 3 De G. J. and S. 672; *re* Childs L.R. 9 Ch. 508; *re* Beale L.R. 4 Ch. D. 246.

[5] The principle is the same as in the Partnership Law Amendment Act, 28 and 29 Vict. c. 86, § 5 (Bovill's Act), and in the Partnership Act, 1890, 53 and 54 Vict. c. 39, § 53. The rule of the common law of England is that a debtor cannot prove in competition with his own creditors, and hence a partner who has a demand against his co-partner cannot prove in respect thereof against the separate estate of the latter whilst any of the joint creditors are unpaid, because by so doing he would diminish any surplus of the separate estate, which, after satisfying the various creditors, might be coming to the joint estate.

but it goes further than the corresponding section (sec. 3) of the English Married Women's Property Act, 1882, which limits the operation of the section to money lent by a wife to her husband for purposes of trade.

Application of old rule.

§ 176. When the *jus mariti* is excluded by contract, and the wife is not dependent for protection upon the statute alone, probably the old rule will hold.[1] Nothing different was suggested in a recent case, and no reference was made to the statute.[2] If the loan is not by the wife but by the trustees of her property the new rule apparently would not apply.[3] It will not apply in any case to a security held by the wife for a loan.[4]

Revocation by wife of donations.

§ 177. The law as to donations between married persons is not touched, it will be remembered, by the Married Women's Property Acts. That law principally operates in practice to cut down gratuitous settlements by husbands in favour of their wives. Revocation is, however, a right possessed by the wife just as much as by the husband. Consequently upon his bankruptcy she may revoke, and rank upon his estate for the amount of the gift.[5]

The result in Scotland is the same, but the principle is different. As each partner is liable for the debts of the firm, one could not claim upon the other in competition with the creditors of the firm.

[1] *Supra*, § 102.

[2] Laidlaw *v.* Laidlaw's Trustee, 16 Dec. 1882, 10 R. 374.

[3] See *In re* Kershaw, L.R. 6 Eq. 322; Newlands *v.* Miller, 14 July, 1882, 9 R. 1104.

[4] *Ex parte* Sheil, L.R. 4 Ch. D. 789; cf. May, *supra*, p. 134, note [2]. Nor does it apply when the loan is to a partnership of which her husband is a member, *Ex parte* Nottingham, L.R. 19 Q.B.D. 88.

It has been held that a person who had made a loan under Bovill's Act is not precluded from claiming and ranking with the other creditors for other sums not advanced under the Act, *Ex parte* Mills, *In re* Tew, 1873, L.R. 8 Ch. App. 569.

[5] Williams *v.* Williams, 15 Nov. 1844, 7 D. 110; Laidlaw *v.* Laidlaw's Trustee, 16 Dec. 1882, 10 R. 374.

CHALLENGE OF PROVISIONS BY CREDITORS.

The questions that most commonly arise in bankruptcy respecting conjugal property have reference to the provisions made for husbands, wives, or children.

No claim for aliment in sequestration.

§ 178. 1. *Legal Provisions.*—At common law neither a man's children nor his wife have, in a question with creditors, any claim for aliment, not even out of the rents of heritage which passed to the husband *jure mariti.*[1] An undertaking by a father in his ante-nuptial contract of marriage to aliment, entertain and aliment his children does not add to his obligation *jure naturae* or make it more effectual in a question with creditors.[2] A wife cannot during her husband's life compete with creditors for prospective *jus relictae* or terce; or after his death for aliment. Children cannot compete for legitim.[3]

Conventional provisions are foundation for claim in sequestration.

§ 179. 2. *Conventional Provisions.*—The provisions made for husband and wife and children by ante-nuptial and even by post-nuptial contract are, in a question with creditors, in an entirely different position from those which arise by law. Terce, *jus relictae,* and legitim are mere *spes;* they confer no present right, and emerge only upon the husband's death, and then only to a surviving wife and surviving children, for they do not admit representation. The object of a marriage contract, on the other hand, is to create a present and

[1] Ogilvy's Creditors *v.* Scot, 1687, M. 5892; Robb *v.* Robb's Creditors, 1794, M. 5900; Lee *v.* Watson, 1795, M. 5889. See *supra,* §§ 5, 68.

[2] Macintosh *v.* Gibson, 17 Dec. 1819, Hume 10.

[3] Reasonable mournings will be allowed to widow and children, in a question with creditors. Sheddan *v.* Gibson, 1802, M. 11,855; Buchanan *v.* Ferrier, 14 Feb. 1822, 1 S. 323. In a question with heirs the case is different. As to aliment to widow generally, Lowther *v.* M'Laine, 1786, M. 435, Hailes 1012; De Blonay *v.* Oswald's Representatives, 17 July, 1863, 1 M. 1147. Aliment by heir of brothers and sisters, Ersk. 1. 6. 58.

definite claim, and in so far as this is effected and the deed is not challengeable upon other grounds, the provisions it makes will be effectual in a question with creditors, although these provisions are the substitute for or the counterpart of the provisions made by law. The natural obligation upon a husband to aliment his wife gives her, as we have seen, no right to claim for that aliment against his creditors; but if he has by ante-nuptial contract agreed to give her a reasonable aliment, that is an obligation which will entitle her to rank upon his estate, along with his onerous creditors, to the effect of securing a fund for her aliment.[1]

Fraudulent preferences at common law.

§ 180. 3. *Fraudulent Preference.*—To enable anyone having right under a contract of marriage to compete with the creditors of the spouse who is the grantor of that right, in the event of his bankruptcy, it is essential that it be not what the law defines as a fraudulent preference. From the moment of insolvency of a debtor, says Professor Bell,[2] "his funds are no longer his own, which he can be entitled secretly to set apart for his own use, or to give away as caprice or affection may dictate. . . . the creditors . . . are not required to enter on any scrutiny into the secret plans and fraudulent views of their debtor and of his friends, but have to direct their inquiries to these points alone: whether was this man insolvent when he granted this deed, or constituted this debt? and, whether did he receive a valuable consideration, or was it granted without a true and just cause?" This is a statement of the common law[3] founded

[1] 1 Bell, *Com.* 639 (5th ed.), 684 (7th ed.).

[2] 2 Bell, *Com.* 182 (5th ed.), p. 170 (7th ed.).

[3] See also Stair 1. 9. 12; Ersk. 4. 1. 44; Roseberry *v.* MacQueen, 1 July, 1823, 2 S. 443.

upon the civil law.[1] In Scotland, as at Rome, it has been enlarged by statute for rendering it more efficacious. This was by the well-known statute, 1621, c. 18,[2] which makes special provision for the case of creditors prior to the date of the gratuitous alienation to conjunct and confident persons by an insolvent.

Act 1621, c. 18.

§ 181. This Act is a confirmation of an Act of Sederunt of 12th July, 1620, which after reciting "the godlesse deceites" of dyvours and bankrupts who, "in manifest defraud of their creditours, do make simulate and fraudful alienations . . . to their wives, children, kinsmen, alleyes, and other confident and interposed persons, without any true, lawful, or necessarie cause, and without any just or true price interveening in their saids bargaines, whereby their just creditours and cautioners are falsly and godlesly defrauded . . . " enacts that the Lords "will decreete and decerne all alienationes, dispositions, assignations, and translations whatsoever made by the debtor of any of his lands, teindes, reversions, actions, debtes, or goods whatsoever, to any conjunct or confident person without true, just, and necessarie causes, and without a just price really payed, the same beeing done after the contracting of lawful debtes from true creditors; to have beene from the beginning and to be in all times comming null and of none availe, force nor effect, at the instance of the true and just creditor."

Gratuitous alienations by an insolvent invalid in a question with creditors.

§ 182. Both at common law, therefore, and by statute, *gratuitous* alienations by an *insolvent* to his wife or chil-

[1] See Hunter's *Roman Law*, p. 881 *et seqq.*; Mackeldey, *Modern Civil Law*, Special Part ii., Appendix ii., §§ 9, 10 (Lipsiae, 1847).

[2] It and the precedent A.S. are founded apparently upon the two statutes of Elizabeth regarding fraudulent gifts, 13 Eliz. c. 5, and 27 Eliz. c. 4, which still regulate the law of Marriage Settlements, antenuptial and post-nuptial, in England.

dren are invalid in competition with the onerous creditors of the husband and father. They are, in the language of the statute, alienations to conjunct and confident persons without true, just and necessary cause made after the contracting of lawful debts from true creditors, and are therefore of no avail in a question with such creditors.

POST-NUPTIAL PROVISIONS TO SPOUSES.

Marriage as consideration for ante-nuptial contract.

§ 183. Marriage is the highest consideration known in the law and is a true, just and necessary cause in the sense of the statute. Marriage itself is therefore sufficient consideration for an ante-nuptial contract, and such a deed and its provisions in favour both of wife and children are good against the husband's creditors, even although he was insolvent at the time when he entered into the marriage,[1] provided there was no fraud.[2] Thus if the marriage itself and the contract made in view of it were merely part of a fraudulent scheme to defeat the just claims of creditors the contract cannot stand.[3] Apart from fraud, the deed is binding as an onerous obligation of the husband. There may be a question whether such provisions are good in so far as they exceed a reasonable and moderate allowance, but to that extent there can be little or no doubt that they are valid.[4]

[1] M'Lachlan *v.* Campbell, 29 June, 124, 3 S. 1892; Carphin *v.* Clapperton, 24 May, 1867, 5 M. 797; Duncan *v.* Sloss, 1785, M. 987, as explained in the preceding case.

As to the English Law, see Campion *v.* Cotton, 17 Ves. 263; Kevan *v.* Crawford, L.R. 6 Ch. D. 29.

[2] Fraser *v.* Thompson, 4 De G. & J., 659; Bulmer *v.* Hunter, L.R. 8 Eq., 46.

[3] See per Lord Ormidale in Watson *v.* Grant's Trustees, 14 May, 1874, 1 R. at p. 887; *In re* Pennington, 1888, 5 Morrell Bankruptcy Cases, pp. 216, 268; Wood *v.* Reid, 1680, M. 977; Dig. 42. 8. 25. § 1.

[4] 1 Bell, *Com.* p. 684 (7th ed.), p. 637 (5th ed.); M'Laren on *Wills*,

Marriage as consideration does not subsist in the case of a post-nuptial contract.

§ 184. In the case of a post-nuptial contract, marriage no longer subsists as consideration, as in ante-nuptial arrangements.[1] The wife has accepted the position and the rights which the law assigns to her: she is identified with her husband; "*conjux prosperis dubiisque socia.*"[2] On the principle therefore of unity of person she cannot, during the marriage, compete with his creditors, amongst whom, apparently, are to be reckoned children of a former marriage claiming under their mother's contract of marriage.[3]

A provision is not necessarily gratuitous because it is post-nuptial.

§ 185. Every provision in favour of a wife is not, however, necessarily gratuitous because it is post-nuptial. The question in each case is whether the provision is a donation and therefore gratuitous, or whether it is founded upon a consideration that is in law deemed onerous.

Old view was that post-nuptial provision for aliment of wife was good against creditors.

§ 186. Lord Stair seems to have been of opinion that competent provisions to husbands or wives *ad sustinenda onera matrimonii* were valid although post-nuptial.[4] This is not now law, at least in this form.

At one time the idea was prevalent that as the husband is bound to aliment his wife and children, he is therefore entitled to fulfil this obligation by setting aside a

i. p. 419; M'Lachlan *v.* Campbell, 29 June, 1824, 3 S. 192; Carphin *v.* Clapperton, 24 May, 1867, 5 M. 797. See per Lord Neaves in Miller *v.* Learmonth, 21 Nov. 1871, 10 M. at p. 115; Fraser, *Husband and Wife*, ii. p. 1350.

[1] See Campbell *v.* Creditors, 1744, M. 988. Marriage was held to be consideration for a post-nuptial provision to a wife: but this cannot now be regarded as law.

[2] Tacitus, *Ann.* 12. 5. He repeats the same sentiment, *Ib.* 3. 15; 3. 34; *Germ.* 18.

[3] Guthrie *v.* Cowan, 21 Nov. 1846, 9 D. 124.

[4] Stair 1. 9. 15: See also Dirleton's *Doubts*, *s.v.* Aliment.

part of his property for the purpose, and that if he did so it would be protected against his creditors.[1] "But there is," says Lord Chelmsford,[2] "no natural obligation upon a husband, recognized by Scotch law, to divest himself of a portion of his property and put it out of his control to provide for his wife and children. On the contrary, it would rather appear to be his natural duty to preserve his right, as head of the family, to dispense his means according to a just view of his obligations, and not to deprive himself of the exercise of that discretion by making an absolute and irrevocable disposition of any portion of it to his wife." During the subsistence of the marriage the wife has right to be alimented; but in what style? Only to be alimented according to the circumstances of her husband. If he fall into poverty she must suffer. It cannot be said that during his life she is entitled to have such and such luxuries, independent of his circumstances. If the post-nuptial contract affects to make her independent of her husband and his circumstances, this is pure donation and cannot be supported.[3]

Now decided that is not law.

§ 187. After the death of the husband the position of matters is different. The wife has her claim for *jus relictae* and terce, and these may be the subject of bargain between her and her husband; and he may make a conventional provision for her in lieu of these claims. Again, while a husband is bound during his life to maintain his wife, he cannot be compelled to make provision for her after his death, and, this being so,

But provision to take effect at husband's death will be sustained.

[1] This was vigorously combatted by George Brodie, Brodie's *Stair*, i. p. 99 note.

[2] Dunlop *v.* Johnston, L.R. 1 Sc. App. at p. 112, S.C. in Court of Session, 24 March, 1865, 3 M. 758.

[3] Per Lord Benholme in Johnston *v.* Dunlop, 24 March, 1865, 3 M. at p. 764.

the law allows him to do so by post-nuptial contract.[1] To support such a provision it is necessary

Subject to conditions.

(*a*) That the husband be solvent at the date of the deed.

(*b*) That the provision be reasonable.

(*c*) That it is to take effect only upon the husband's death.[2]

(*d*) That the provision is not revocable or defeasible by the husband.[3]

Intermediate income.

§ 188. The mere fact that there is income derivable from the provision will not invalidate it. If the provision has been made by means of immediate investment, the revenue during the husband's lifetime will, even although in terms payable to the wife, belong to his creditors if he becomes bankrupt, and as a counterpart he will remain liable for the

[1] See per Lord Gifford in Melville *v.* Melville, 15 July, 1879. 6 R. 1286. The ancient rule was that the sum settled by the husband by post-nuptial contract upon the wife must not exceed the tocher he received with her. *Reg. Maj.* ii. c. 15 (ed. Skene). The maxim was, *Dos et donatio propter nuptias in jure paribus passibus ambulant et æqualiter regulantur.* This was copied from the civil law regarding *Donatio propter nuptias;* it might not exceed the *dos.* As the husband was bound to dower his wife, a provision in lieu of dower was not a donation, Pothier, *Traité du Douaire*, §§ 5, 6, *Œuvres*, vi. p. 318.

[2] Dunlop *v.* Johnston, 24 March, 1865, 3 M. 758, affd. H.L., L.R. 1 Sc. App. 109; Craig *v.* Galloway, 1861, 4 M'Q. 267; Rust *v.* Smith, 14 Jan. 1865, 3 M. 378; Donaldson *v.* Thomson, 25 Jan. 1873, 11 M. 347; Thomas *v.* City of Glasgow Bank, 31 Jan. 1879, 6 R. 607; Miller *v.* Learmonth, 1870, 2 Paterson, App. Ca. 1777. Here the provision was made out of the wife's own legitim, which had fallen to the husband *jure mariti.* The distinction between a provision *stante matrimonio* and one to take effect on the husband's death was early recognized. See *e.g.* Gordon *v.* Gregory, 21 Jan. 1658, a case decided by the English Commissioners. *Decisions of the English Judges*, p. 129.

[3] Honeyman *v.* Robertson, 7 Dec. 1886, 14 R. 163; cf. Jardine *v.* Currie, 17 June 1830, 8 S. 937.

obligations affecting the investment during his life.[1] If the husband's *jus mariti* was not excluded under the old law, then, although the fee might belong to the wife as provision, the income fell to the husband *jure mariti*.[2]

Reconciliation of old and new views.

§ 189. A post-nuptial contract, therefore, is to this extent held to proceed on, and to be granted for, a true, just and necessary cause.[3] The old and the present views of the law are reconciled, if the matter of time be considered in the question of reasonable provision. The older authorities, in handling that question, did not take into account the time from which the provision is to be productive; recent decisions say that this is of the essence of the case, and that any allowance prior to the husband's death is unreasonable.

Post-nuptial provision for a wife valid if it complies with above conditions.

§ 190. In a question with creditors, therefore, at common law or under the Act, 1621, a post-nuptial provision for a wife, of reasonable amount, by a solvent husband to take effect upon his death will be upheld, and will entitle her to rank as a creditor in the event of his bankruptcy. In a question with the husband himself it will likewise be treated as onerous, and therefore not revocable.[4] If he could revoke,

[1] Kemp *v.* Napier, 1 Feb. 1842, 4 D. 558; Wood *v.* Begbie, 7 June, 1850, 12 D. 963; Dunlop *v.* Johnston, *supra*; Ferguson *v.* Ferguson, 7 Nov. 1871, 10 M. 54; Thomas *v.* City of Glasgow Bank, *supra*, p. 142.

[2] Rust *v.* Smith, 14 Jan. 1865, 3 M. 378; explained by Lord Deas in Thomas *v.* City of Glasgow Bank, *supra*.

[3] Professor Forbes states the law thus: "There is this difference betwixt a man's gift to his wife and hers to him; That the former will be sustained as a remuneratory gift *propter nuptias* simply, if there was no contract of marriage, and it be moderate, and may be revoked, in so far as it is exorbitant, or unsuitable to the quality and condition of the married persons." *Institutes of the Law of Scotland*, i. p. 62. This statement is correct as the law still stands as against the husband and as against creditors, if the gift is to take effect as on the husband's death only.

[4] Low *v.* Low's Trustees, 20 Nov. 1877, 5 R. 185; Thomas *v.* City of

Not revocable.

the right of revocation would vest in a trustee for creditors. In one word, the question turns upon the distinction between a donation and a provision. A donation is revocable, a provision is not.

Question when husband insolvent.

§ 191. In a question with creditors, it can scarcely be doubted that a post-nuptial provision for a wife by an *insolvent* husband is not good to any extent. It certainly would not be so *quoad excessum*.[1]

Law modified by policies of Assurance Act.

§ 192. *Policies of Assurance Act.*—The law as to post-nuptial contracts has been modified by statute as respects policies of assurance. At common law a husband can make an effectual post-nuptial provision for his wife by means of a policy of insurance upon his own life.[2] But such a provision stands at common law upon the same footing as other post-nuptial provisions in the case of the settlor's bankruptcy.

A policy under the Act only challengeable on certain statutory grounds.

§ 193. A policy effected under and in terms of the Married Women's Policies of Assurance (Scotland) Act, 1880, is, however, on a different footing. It does not form part of the husband's estate, and is not liable to the diligence of his creditors, and is not revocable as a donation,[3] or reducible on any ground of excess or of insolvency. The statute does not regard the solvency of the husband at the

Glasgow Bank, 31 Jan. 1879, 6 R. 607; Forbes *v.* City of Glasgow Bank, 28 June, 1879, 6 R. 1122; Hepburn *v.* Brown, 1814, 2 Dow, 342.

[1] Carphin *v.* Clapperton, 24 May, 1867, 5 M. 797; Morrice *v.* Sprot, 27 June, 1846, 8 D. 918 (in this case it was not alleged that the husband was insolvent at the date of the deed). See Short *v.* Murray, 1677, M. 6124, 3 B.S. 235; Lindores *v.* Stewart, 1715 M. 6126.

[2] Craig *v.* Galloway, 1861, 4 M'Q. 267; explained in Thomas *v.* City of Glasgow Bank, 31 Jan. 1879, 6 R. 607; Smith *v.* Kerr, 5 June 1869, 7 M. 863.

[3] See Connecticut Insurance Co. *v.* Burroughs, 91 Am. Dec. 725.

time of effecting the policy or its amount or the amount of premiums payable. It introduces, however, a new condition :—If it is proved that the policy was effected and the premiums paid with intent to defraud creditors, or if the person upon whose life the policy is effected shall be made bankrupt within two years from the date of the policy, it is competent to the creditors to reclaim payment of the premiums so paid out of the proceeds of the policy.[1] If neither of these qualifications can be proved it would seem that the policy is good against the husband's creditors. "It appears to me," says Mellish, J., "that so far as regards the insurance of a man's life for the benefit of his wife and children, the Legislature intended to alter the law, and to say that the creditors would only get what they would fairly be entitled to, namely, that premiums paid in fraud of them should be repaid to them out of the money payable under the policy. Therefore I am of opinion that this . . . section . . . has so far modified the . . . *Bankruptcy Act*, that if a trader effects a policy accordingly it will be valid under the *Married Women's Property Act*, subject to any liability there may be to repay the premiums paid in fraud of his creditors."[2] The qualification as to a trader refers to the terms of sec. 91 of the English *Bankruptcy Act* of 1861, and has no applicability in Scotland; while as regards England, the *Bankruptcy Act* of 1883[3] has now removed all distinctions between traders and non-traders in respect of liability to be made bankrupt.

[1] This is taken from the English Statute, 33 and 34 Vict. c. 93, § 10, and the same provision occurs (§ 11) in the English Married Women's Property Act, 1882. It is a modification of a rule of English bankrupt law. See the Bankruptcy Act, 1869, 32 and 33 Vict. c. 71, § 91, and the Bankruptcy Act, 1883, 46 and 47 Vict. c. 52, § 47.

[2] See Holt *v.* Everall L.R. 2 Ch. D. at p. 276.

[3] 46 and 47 Vict. c. 52.

Modification of law by Married Women's Property Act.

§ 194. The law as to post-nuptial provisions has also been modified to a certain extent by the Conjugal Rights Act,[1] and by the Married Women's Property Act.[2] It is competent to all persons married before the passing of that Act (18th July, 1881) to declare by mutual deed that the wife's whole estate, including such as may have previously come to the husband in right of his wife, shall be regulated by the Act. The deed must be registered and advertised, and is subject to the proviso that it shall not be of any effect as against any debt or obligation, contracted by the husband, prior to the date of the deed being so advertised and registered.

This, it will be observed, is a condition in favour of all prior creditors of the husband. It confers no right, however, upon posterior creditors, and is independent of the question whether he was solvent or insolvent at the time.

Post-Nuptial Provisions to Children.

Post-nuptial provision by an *insolvent* parent challengeable.

§ 195. Post-nuptial provisions by an *insolvent* father to his children *nati* or *nascituri* are deemed gratuitous, and may consequently be annulled in a competition with creditors.[3]

But donation by a *solvent* parent is not.

§ 196. The position of children, as regards post-nuptial provisions, is more favourable than that of wives, if their father was solvent at the date of granting. A donation by a father to his children is not revocable, and is not therefore affected by his subsequent sequestration.[4] A transfer of money or property to the children or to trustees for their behoof,

[1] *Supra*, §§ 62, 63, 66; Appendix, p. 182.

[2] *Supra*, § 95; Appendix, p. 199.

[3] See Ersk. 4. 1. 34.

[4] M'Gibbon *v.* M'Gibbon, 5 March, 1852, 14 D. 605; see per Lord Mackenzie *primus* in Morrice *v.* Sprot, 27 June, 1846, 8 D. 918; Smitton *v.* Tod, 12 Dec. 1839, 2 D. 225.

or an obligation in their favour to take effect,—technically, to constitute a *jus crediti*,—in his lifetime,[1] is valid in a competition with his other creditors.

Conditions necessary to validate a post-nuptial provision to children.

§ 197. The only conditions necessary to validate such a provision are (*a*) That the parent was solvent at the date of the delivery of the deed;[2] (*b*) That a *jus crediti* has been constituted, or that property has been duly transferred;[3] and (*c*) That the transaction is not intended merely as a fraud upon creditors.[4]

If these conditions are fulfilled, a transfer of property cannot be reduced; and a provision *in obligatione* will enable the children to compete with onerous creditors of their father. "A father may effectually denude himself in his lifetime of any fund or subject belonging to him, and if he does so absolutely, without fraud, and while solvent, the deed is unchallengeable."[5]

Policies of Assurance Act applies to children.

§ 198. The provisions of the Policies of Assurance Act apply to children as well as to wives, and what has been said in regard to policies effected for the benefit of wives applies equally to policies effected for the benefit of children.[6]

[1] See Morrice *v.* Sprot, 27 June, 1846, 8 D. 918; Geddes *v.* Waddell, 5 July, 1836, 14 S. 1084. In this case certain bonds were granted by a *solvent* man in favour of his children, but the money was not payable until after his death. It was found that the children could not compete with his creditors, because there was not a *jus crediti*. See *post*, § 208.

[2] Dawson *v.* Thorburn, 12 July, 1888, 15 R. 891.

[3] If the property is transferred, but the provision to the children is only payable at the father's death, it is of no effect against his creditors. Bruce *v.* Bruce, 9 June, 1831, 9 S. 695. Geddes *v.* Waddell, *supra*, note [1].

[4] Roseberry *v.* M'Queen, 1 July, 1823, 2 S. 443; Dig. 42. 8. 17, § 1.

[5] Per Lord Neaves in Wilson's Trustees *v.* Pagan, 2 July, 1856, 18 D. at p. 1111; per Lord Craigie in Bruce *v.* Bruce, *supra*.

[6] *Supra*, § 196.

CLAIMS OF PROVISEES ON A SEQUESTRATED ESTATE.

JUS CREDITI.

Jus crediti.

§ 199. A contract of marriage may not, in itself, be liable to challenge at the instance of creditors, and its provisions may, in a question with the person who grants them and his heirs, be onerous and irrevocable, and yet these may not be such as will entitle wife or children to a preference or even to compete with creditors.

Conditions necessary to give a preference.

To entitle the provisees to a preference they must have an unexceptionable claim and have obtained security therefor.[1] To entitle them to compete with creditors they must themselves be in the position of creditors, or, as technically expressed, they must have a *jus crediti*.[2] If this is effected, then, if the provisions have been secured, they are entitled to a preference; if the provisions have not been secured, they are entitled to rank upon the grantor's estate *pari passu* with his other creditors, in the event of his sequestration.[3] If the provisions do not constitute a *jus crediti*, but affect the grantor's succession, *i.e.*, if they are

Or a claim as creditors.

[1] Ross *v.* Mackenzie, 11 July, 1838, 16 S. 1385. See Wilson's Trustees *v.* Pagan, 2 July, 1856, 18 D. 1096, 2nd branch as to life policy. Edmond *v.* Gordon, 16 Nov. 1855, 18 D. 47, affd. H. of L. 3 M'Q. 116.

[2] *Jus crediti* is defined by Lord Benholme in Wilson's Trustees *v.* Pagan, *supra*, 18 D. at p. 1104, as "a right which entitles the parties vested with it to compete with onerous creditors upon a deficient fund." See also per M'Neill, L.P., *ib.* p. 1127. See *post*, § 214, note [6].

The phrase was no doubt borrowed from the civilians, who distinguished between creditors *Separati ex jure dominii* and those *Separati ex jure crediti;* although *jus crediti* is there used in a much narrower sense than with us. It referred to a class of creditors who claimed against a particular portion of the bankrupt estate, to the exclusion of all others.

[3] 1 Bell, *Com.* pp. 639, 640 (5th ed.); p. 685 (7th ed.); Brodie's *Stair*, p. 556,

testamentary merely, they cannot compete with onerous creditors.

There is no difficulty in so framing a provision as to give a *jus crediti*; but it was long before the law was settled; and many questions have arisen upon clauses, in the framing of which the contingency of bankruptcy and the constitution of claims capable of competing with those of onerous creditors were not in the mind of the draftsman.

Provisions in favour of a wife deemed onerous.

§ 200. 1. *As regards Wives.*—As a rule, the provisions made by a husband in favour of his wife by ante-nuptial contract are, irrespective of the time when they are to be paid, deemed onerous, and the wife is allowed a preference, or to claim in the sequestration, according as her provisions have been secured or not.

No matter that they are not payable until after husband's death.

§ 201. It is no objection to an annuity to a wife that it is only payable in the event of her surviving her husband, and consequently upon his death. Such an obligation by the husband in an ante-nuptial contract confers upon her a *jus crediti* which will entitle her, upon his bankruptcy, to be ranked upon his estate as a contingent creditor,[1] and to draw dividends along with his onerous creditors. Such an obligation in a post-nuptial deed will also confer a *jus crediti* and entitle the wife to a ranking, provided the conditions specified in § 187 are satisfied.

Provisions cannot compete with onerous debts if they are testamentary only

§ 202. It may be that a contract of marriage, ante-nuptial or post-nuptial, is testamentary in its character, and the provision in favour of the wife consequently a right of succession only. If so, she cannot compete with the husband's

[1] Comb *v.* Chapman, 2 March, 1826, 4 S. 513; Ross *v.* Mackenzie, 11 July, 1838, 16 S. 1385; The Bankruptcy (Scotland) Act, 19 and 20 Vict. c. 79, §§ 53, 54. Duff, *Treatise on Deeds*, pp. 181, 192.

creditors. Thus, a husband bound himself by ante-nuptial contract to pay to trustees £1,200, to be held for behoof of the spouses in such manner as they should instruct, and directed that, in the event of the wife predeceasing, any part of the sum that remained should be at the absolute disposal of the husband. In the event of his predecease, any part so remaining was to form part of his estate; and the deed next conveyed the whole estate of the husband to the wife in liferent and to the children in fee. The husband became bankrupt, and the Court held that the wife took only as disponee and executrix of her husband; as a successor, not as a creditor. The whole estate was vested in him absolutely until his death, and therefore passed to his creditors upon his sequestration.[1] On the other hand, where a husband by marriage contract provided a certain sum to himself, his wife, and the survivor in liferent, and to the children of the marriage in fee, and settled the conquest in fee to the children and one half of it in liferent to the wife; and in case of no children surviving the husband, or in case of their dying before majority or marriage, the fee of one half both of the provision and of the conquest was to fall to the wife, it was held that she had a proper *jus crediti* and was not a mere heir substitute to her children.[2]

Old doctrine that children could not be creditors for provisions.

§ 203. 2. *As regards Children.*—At one time it was held that children who took a provision, by virtue of an obligation *liberis nascituris*, necessarily took as heirs of the marriage or as heirs of provision, no matter what were the terms in which the obligation was conceived; and by a train of

[1] Grant *v.* Robertson, 15 June, 1872, 10 M. 804. See also Honeyman and Wilson *v.* Robertson, 7 Dec. 1886, 14 R. 163; Darling *v.* Mein, 20 Dec. 1851, 1 Stuart 233.

[2] Burden *v.* Smith, 1738, Elchies *v. Mutual Settlement* No. 7; Cr. and St. 215.

reasoning similar to that which established that the *jus mariti* must forever flow back to the husband who renounced it, it was determined that, as such heirs, they were liable to their father's creditors to the extent of the sum which they received.[1] This view of the law was gradually abandoned, and it was ultimately settled that there was nothing to prevent children from being creditors of their father, or him from contracting a debt in their favour. It therefore came to be a point of construction, the question being, Has such an obligation been contracted? If so, then the children are in the language of the old lawyers "creditors with creditors," or as we now say, they have a *jus crediti*. If they have nothing more than a right of succession, they are "heirs amongst creditors and creditors amongst heirs"; in other words they have only a *spes successionis*. It is also settled that such an obligation can be undertaken not only to children *nati*, but to children *nascituri*.

Now decided that they can be so.

There was often a difficulty in protecting the rights of children when investments, other than those in or upon land, were practically unknown, especially where, as was often the case, it was necessary to leave the administration of the husband's estate in his own hands. Hence the early decisions are largely mixed up with technical rules of feudal law.[2]

§ 204. Nowadays provisions to children are generally in money, and if they are secured at all upon land it is by means

Nature of provisions now made to children.

[1] Grahame *v.* Rome, 1677, M. 12887; Marjoribanks *v.* Marjoribanks, 1682, M. 12891.

[2] Per Lord Cringletie in Brown *v.* Govan, 1 Feb. 1820, F.C. The old practice of providing for younger children is explained by Lord Murray in Kippen's Trustees *v.* Kippen, 3 July, 1856, 18 D. at p. 1164, and see per Lord Deas at p. 1185. See also Browning *v.* Hamilton, 25 May, 1837, 15 S. 999; Herries, Farquhar & Co. *v.* Brown, 9 March, 1838, 16 S. at p. 965.

of an express trust. The obligation undertaken by the parent is to pay a certain sum of money. It may be at a definite time during the lifetime of the father,—assuming him to be the grantor of the obligation,—or after his death, or it may be at an indefinite date: it may be secured, or it may be unsecured; interest may be payable from a day certain, although payment of the principal is deferred, or the payment both of principal and interest may be deferred. The point is, Are the children constituted creditors of the father in any shape during his life, or is their claim only upon his estate at his death? Have they a *jus crediti*, or a *spes successionis?* "Every question in a marriage contract," says Lord Eskgrove, "in which children are concerned, is to be interpreted favourably for the children, for marriage contracts, so far as children are concerned, are onerous, and entitled to a liberal construction in favours of the children. If clauses appear which can receive no other interpretation than a *jus successionis*, there is no help for it: But when a provision is given in terms that bestow a *jus crediti*, and give a ground of action to the children against the father, they are as truly onerous as any debt which the father can be owing."[1]

Rules for determining whether a *jus crediti* has been conferred.

§ 205. In determining whether a *jus crediti* has been conferred the following rules have been established:—

(*a*) An unqualified obligation by a father to pay a sum of money to his children, or to settle a portion of his property for their behoof, constitutes them his creditors;[2] but if the term of payment is postponed until after his death,

[1] In Mackenzie's Creditors *v.* Mackenzie (Redcastle Case) Bell's 8vo Cases at p. 419. To the same effect see per Lord Deas in Forrest *v.* Robertson's Trustees, 27 Oct. 1876, 4 R. 22. The presumption was formerly the other way, Gordon *v.* Sutherland, 1748, M. 12915, 4398, H. of L., Cr. and St. 493.

See Adv. General v. Trotter, 12 Nov. 1847, 10 D. 56; S.C. Reports of Exchequer Cases in Scotland, No. 4.

with or without the payment of interest after that term, they are held to have merely a *spes successionis:* they are, to use the quaint but apt phrase of the old writers, heirs among creditors and creditors among heirs; their claim is against heirs or lucrative successors, not against onerous creditors;[1] or, as otherwise stated, they are only *quodammodo* creditors.[2] As expressed in recent cases, they have a protected succession. They have a *jus crediti* against the succession, not against onerous creditors. It does not make them creditors of the father during his lifetime, or creditors at any time, in competition with his creditors in onerous debts and obligations; but makes them creditors; against the estate of their father after his decease for performance of the obligations contained in the marriage contract.[3]

(a) *Morata solutio* bars claim of children in a question with onerous creditors.

§ 206. If the provisions in favour of children are founded upon transactions with them, or with some one on their behalf, *e.g.*, if a right or privilege has been given up by them, or an obligation has been undertaken in the contract by a third person as consideration for the provisions, they cease to be gratuitous, and stand upon the same footing as other onerous obligations, although the date of payment is postponed until after the father's death.[4]

Otherwise if the provisions are remuneratory.

[1] Herries, Farquhar & Co. *v.* Brown (the Clanranald Case) 9 March, 1838, 16 S. 948. As to this case see Hope, L.J.C., in Wilson's Trustees *v.* Pagan, 2 July, 1856, 18 D. at p. 1103; and per Lord Deas in Forrest *v.* Robertson's Trustees, 27 Oct. 1876, 4 R. at p. 42. Goddard *v.* Stewart's Children, 9 March, 1844, 6 D. 1018; Harvie *v.* Wink, 3 July, 1847, 9 D. 1420; Wilson's Trustees *v.* Pagan, 2 July, 1856, 18 D. 1096; Dundas *v.* Dundas, 16 May, 1839, 1 D. 731.

[2] *I.e.*, limited creditors, creditors to the extent of setting aside gratuitous deeds. So it is said of a husband that he is *quodammodo* a creditor in respect of his courtesy, 3 Br. Supp. 146.

[3] Arthur and Seymour *v.* Lamb, 30 June, 1870, 8 M. 928; Gillon's Trustees *v.* Gillon, 8 Feb. 1890, 17 R. 435.

[4] Gordon *v.* Murray, 9 Feb. 1833, 11 S. 368; Gourlay *v.* Thomson, 15

(b) Children have *jus crediti* if they are entitled to abridge father's power of administration during his life.

§ 207. (*b*) If, on the other hand, although the provision is payable after the death of the father, the children or some one on their behalf have the power of suing him to compel him to do something in their favour abridging his power of administration of his estate, they have a *jus crediti*.[1] Thus if the father obliges himself to secure the provisions in his lifetime—*e.g.*, by an infeftment in favour of the children, or in the persons of trustees for their behoof, or by investment in some form, either directly or through trustees, this is an obligation of debt, and a *jus crediti* which can compete with onerous creditors is conferred upon the children.[2] *Multo magis* if the security has been constituted by infeftment in the person of the children, or in the persons of trustees for their behoof.

This, it has been held, shows that the intention was that in any case the money was to be forthcoming. The property is not left in the administration of the parent, but a real and effectual right in it is transferred to the children or the trustees, which will give

Dec. 1820, affd. 11 May, 1824, 2 Sh. App. Ca. 183. In this case there was a surrender of a lease, which was held to be valuable consideration for the provisions made. Blackburn *v.* Oliver, 29 May, 1816, F.C.; Garden *v.* Stirling, 26 Nov. 1822, F.C. S.C. 2 S. 39. These cases had reference to obligations undertaken by fathers in their daughters' contracts of marriage. Montgomery *v.* Hart, 17 July, 1845, 7 D. 1081. Here the husband sold his wife's *paraphernalia* and gave her an undertaking that she should be entitled to the amount at his death.

[1] See per Lord Benholme in Wilson's Trustees *v.* Pagan, 2 July 1856, 18 D. 1096.

[2] Douglas *v.* Douglas and Drummond, 1724, M. 12910; Nasmyth *v.* Brands, 1731, M. 12914; Anonymous Case quoted in Gordon *v.* Sutherland, 1748, M. 12915; but see the explanation of this case given by Lord Benholme and other judges in Wilson's Trustees *v.* Pagan, *supra*. There was a different decision in Brown *v.* Govan, 1 Feb. 1820, F.C.; but the law was fixed in Herries, Farquhar & Co. *v.* Brown, 9 March, 1838, 16 S. 948.

them not only a *jus crediti* but a preference in a question with creditors.[1]

§ 208. But the obligation to secure the provision must itself be definite. It must be something that the children can enforce and not a mere general undertaking, such as is often found in loosely drawn deeds, to give security if and when the father can or chooses to do so.

Obligation must be definite.

§ 209. So too, if the father only obliges himself to take a security to himself in fee, with a mere destination to the children, they have nothing more than a *spes successionis*.[2] A title made up in such terms would have the same result. The father would remain fiar. He could not gratuitously defeat the destination,[3] and in a question *inter heredes* the children's claim would be specific instead of being general; but the children could not claim against his onerous creditors, who, on the contrary, could attach the fund for the father's debts.[4] The character of the right, for the protection of which security is given, must regulate the operation of that security. To give the children a claim to compete with creditors the fee must be taken out of the father.

If security merely amounts to a destination children cannot compete.

[1] Herries, Farquhar & Co. *v.* Brown, *supra*; Bushby *v.* Renny, 23 June, 1825, 4 S. 110; Cruikshank's Trustees *v.* Cruikshank, 4 Nov. 1853, 16 D. 7.

[2] Wilson's Trustees *v.* Pagan, 2 July, 1856, 18 D. 1096; Goddard *v.* Stewart's children, 9 March, 1844, 6 D. 1018. Here there was an actual conveyance. Wilson's Trustees *v.* Pagan, *supra*, 2nd branch, as to the policy of insurance. Wilson *v.* Wight, 18 June, 1816, Hume 537.

[3] Home *v.* Home, 1708, M. 12900; affirmed H.L. Robertson's App. 47; Riddel *v.* Riddel, 1766, M. 13019.

[4] M'Donald *v.* M'Lachlan, 14 Jan. 1831, 9 S. 269; Massey *v.* Scott's Trustees, 5 Dec. 1872, 11 M. at p. 176.

Undertaking by father to reinvest will not convert general obligation into a *jus crediti*.

§ 210. It was at one time held that if an undertaking, which leaves the father fiar, be followed by an obligation that as often as he should uplift the sum he should reinvest it in the same terms, this constituted a *jus crediti* in favour of the children.[1] This was probably on the principle that such an obligation is equivalent to a prohibition to alienate, or a restraint upon the father in the interest of the children; in other words, that the destination was equivalent to a fiduciary fee in the father for the children.[2] This doctrine has, however, been overruled, and it is now settled that an obligation in these terms does not create a *jus crediti*.[3]

Jus crediti conferred if provision payable in lifetime of father or at a time that may happen during his life.

§ 211. *(c)* If the provision is payable during the lifetime of the father, or at a time that may give the children a claim on him during his life—*e.g.* if it is payable[4] at the births of the children, on their attaining a certain age, on their marriage, or at the dissolution of his own marriage,—which may happen in his own lifetime by the predecease of the wife,[5]—a *jus crediti* is conferred upon them, entitling them to rank as onerous creditors;[6] or to a preference if they have obtained

[1] Anonymous Case, quoted in Gordon *v.* Sutherland, 1748. M. 12915, 4398, in H. of L., Cr. and St. 493, and in the Clanranald case, *supra*, p. 153.

[2] *Supra*, § 141; *infra*, § 214.

[3] Wilson's Trustees *v.* Pagan, 2 July, 1856, 18 D. 1096. The minority opinion of Lord Curriehill *primus* in this case is interesting and instructive.

[4] An obligation to transfer property, or to denude oneself of property, would be in the same position as an obligation to pay money.

[5] Browning *v.* Hamilton, 25 May, 1837, 15 S. 999.

[6] In Lyon *v.* the Creditors of Easter Ogle, 1724, M. 12909, a provision in favour of daughters payable at the marriage of each, if in her father's life, otherwise on her reaching the age of 18, was found effectual to make them creditors. In Ballingall *v.* Hendersons, 1759, M. 12919, a similar decision was given. See also Jolly *v.* Graham, 24 Feb. 1824, 2 S. 730. In Douglas *v.* Douglas and Drummond, 1724, M. 12910, the obligation, it was found, imported an obligation to infeft the heirs of the marriage as soon as they existed, and this was held to

security.[1] But not so if the provision is payable after the father's death, although payable to children ascertained at a date in his own lifetime.[2]

Or interest is to run from a date that is or may be in father's lifetime.

§ 212. (*d*) If, although the principal is not payable until after the father's death, it bears interest from the date of the deed or from any term which may be within the father's lifetime, a *jus crediti* is conferred both for principal and interest. This is not affected by the fact that a power of division is reserved to the father.[3]

Time of payment immaterial when provision made by a third person.

§ 213. (*e*) Where a provision in an ante-nuptial contract for the children of the marriage is made by a third person —and in such cases every person, other than the spouses, *e.g.* the father of one of them, is a third person—it is immaterial that it is not payable until after the husband's death.[4]

Jus exigendi as a test of *jus crediti*.

§ 214. It has been suggested that the test of the constitution of a *jus crediti* is whether a *jus exigendi*, a right of action has been conferred;[5] but this is merely restating the problem in a different form.[6] The question then is what

confer a *jus crediti*. The leading case is that of Mackenzie's Creditors *v.* Mackenzie (the Redcastle case), 1792, M. 12924, and App. Prov. to Heirs, No. 3; S.C. Bell's 8vo Cases, p. 404. The last is the best report; affirmed by House of Lords, 3 Paton App. Ca. 409. Here the provision was not payable till after the death of the father, but it bore interest from the majority or marriage of the children, a term which might happen during the life of the father.

[1] Cruikshank's Trustees *v.* Cruikshank, 4 Nov. 1853, 16 D. 7.

[2] Goddard *v.* Stewart's Children, 9 March, 1844, 6 D. 1018.

[3] Mackenzie's Creditors *v.* His Children, 1792 (Redcastle case), M. 12924, Bell's 8vo Cases, p. 404; affd. H. of L. 3 Paton App. Ca. 409. As to this case see Brodie's *Stair*, i. p. 99, note; Clanranald case, *supra*, 16 S. at p. 967.

[4] Gordon *v.* Murray, 9 Feb. 1833, 11 S. 368, *supra*, § 206, note [4].

[5] Per Lord Eskgrove in the Redcastle case, *supra*, Bell's 8vo Cases at p. 419.

[6] It is, indeed, just substituting one phrase for another. "A *jus crediti* may be defined to be a right which the holder of it cannot make

is the extent and nature of the *jus exigendi*, and it is amply illustrated in the old cases arising upon destinations.

A father may oblige himself to take the titles of property, either heritable or moveable, in favour of himself and his wife in liferent, and the children of the marriage *nascituri* in fee. This is an obligation which confers upon them a *jus exigendi* when they come into existence. They are entitled to compel him, by action, to have titles made up in this form, but it does not give them a *jus crediti* to compete with onerous creditors. In such a case the father would remain fiar after the titles were made up in terms of his obligation.[1] They are no better than children whose right stands merely upon destination.[2] If, on the other hand, the obligation is to make up titles in such a form as will limit his powers or make the children the fiars—*e.g.*, if the conveyance is to be to the father in liferent and the children in fee, or if the father is to be constituted fiduciary fiar for the children, the case is different: the *jus exigendi*, if followed out, would confer upon them a *jus crediti*.[3]

Jus exigendi must be such as will result in curtailing father's power of administration.

§ 215. In short, the *jus exigendi* must be such as will, during the father's lifetime, result in a right of action to abridge his powers of administration or the beneficial enjoy-

available, if it is resisted, without a suit to compel persons to do something else in order to make the right perfect." Per Lord Cranworth, L.C., in Edmond *v.* Gordon, 1858, 1 Paterson, App. Ca. at p. 727; S.C. 3 M'Q. at p. 122.

[1] M'Donald *v.* M'Lachlan, 14 Jan. 1831, 9 S. 269; Kennedy *v.* Allan, 19 Feb. 1825, 3 S. 544; Dewar *v.* M'Kinnon, 1825, 1 W. and S. 161; Fulton *v.* King, 1811, Hume, 533.

[2] See per Lord Corehouse in Brownings *v.* Hamilton, 15 S. 999.

[3] *Supra*, § 207; Douglas *v.* Douglas and Drummond, 1724, M. 12910. M'Intosh *v.* M'Intosh, 28 Jan. 1812, F.C.; Newlands *v.* Newlands, 9 July, 1794, M. 4289; Falconer *v.* Wright, 22 Jan. 1824, 2 S. 633.

ment of his property.[1] If the provisees have a *jus exigendi* of that character they have a *jus crediti*. They are creditors of their father, entitled to rank with his other onerous creditors, or to retain their security if their provisions have been secured by part of the father's estate. They have all the rights of ordinary creditors. They may inhibit and adjudge, either absolutely if their rights be purified, or in security if these be contingent and the father be *vergens ad inopiam* or about to flee the country.

A conveyance to children having a *jus crediti* is not challengeable under Act 1621.

§ 216. A disposition by the father to children having a proper *jus crediti* would not be reducible under the act 1621, as granted to a conjunct person without onerous cause.[2]

Children's provisions binding on parent.

§ 217. Although provisions in favour of children may not confer a *jus crediti* in competition with onerous creditors, they will as a general rule bind the father and his representatives so that they cannot be defeated by gratuitous deeds.[3] So, too, although wife or children may not be able to compete with the creditors of their father, they may have a good claim against a cautioner who has obliged himself along with the grantor.[4]

Preference over creditors of heir.

§ 218. Whether the provisiōn is a *spes successionis* or constitutes a proper *jus crediti*, if it imposes an obligation upon the father, the children are entitled to a preference

[1] See, for instance, Cruikshank's Trustees *v.* Cruikshank, 4 Nov. 1853, 16 D. 7.

[2] Ersk. 3. 8. 40; M'Kenzie *v.* M'Kenzie's Creditors, 1792, Bell's 8vo Cases, p. 404; Fraser, *Husband and Wife*, ii. p. 1382; per Lord Curriehill in Wilson's Trustees *v.* Pagan, 2 July, 1856, 18 D. at p. 1134.

[3] *Supra*, §§ 203, 205; Bell, *Pr.* § 1987; Brodie's *Stair*, ii. p. 555; Adv. General *v.* Trotter, 12 Nov. 1847, 10 D. 56, S.C. Reports of Exchequer Cases in Scotland, No. 4.

[4] Fotheringham *v.* Fotheringham, 1734, M. 12929, 12941; Wilson *v.* Wishart, 16 Nov. 1844, 7 D. 125; Ersk. 3. 8. 40.

over the creditors of his heir.[1] If it is a debt only upon the heir, the children can rank only along with the other creditors of the heir.[2] If the heir accepts a disposition from his father *omnium bonorum* burdened with provisions in favour of the widow and younger children, the latter are entitled, on the bankruptcy of the heir, to rank *pari passu* with his other creditors for payment of these provisions, if the free property left by the father was sufficient to meet them.[3]

Jus crediti and vested interest not the same.

§ 219. A *jus crediti* and a vested interest are not to be confounded. A child may have a *jus crediti* which will entitle him to compete with the onerous creditors of his father, but it does not follow that it is vested in him so as to enable him to give right to an assignee if he predecease, or to give his executors a right to take it up as part of his estate.[4]

If child has a vested interest it passes to his creditors on bankruptcy.

§ 220. Hitherto we have been considering the method of giving children a good claim for their provisions, in case of the bankruptcy of their parents. Take now the converse case. The child may become bankrupt, and if he has a vested interest, it will pass to his creditors. Thus, if under the destination of a landed estate, the heir of the marriage is called to the succession, the father cannot gratuitously defeat his right, even although the son becomes bankrupt.[5] If he does so, his creditors are entitled to the rights he has under the marriage contract.

If there is no vested interest the creditors take nothing.[6]

[1] Sayer, §§ 203, 205; Wilson *v.* Wilson, 1811, Hume 534; Dundas *v.* Dundas, 16 May, 1839, 1 D. 731; Kibble *v.* M'Donald, 16 Feb. 1832, 10 S. 341.

[2] Cameron *v.* Robertson, M. 12879.

[3] Menzies *v.* Murdoch, 14 Dec. 1841, 4 D. 257.

[4] Fraser, *Husband and Wife*, ii. p. 1372.

[5] Spiers *v.* Dunlop, 1778, M. 13926; Fraser, *Husband and Wife*, ii. p. 1418.

[6] M'Millan's Creditors *v.* M'Millan, 2 July, 1813, Hume, 536.

Thus, when any assignation of a *spes successionis* was, in the deed which conferred it, declared to be void, it was held that the trustee on the sequestrated estate of the person prospectively entitled to it was not entitled to an assignation to it, as a condition of the bankrupt's discharge.[1] But if a child has a *jus crediti*, it is none the less property which will pass to the trustee, because it is subject to a power of division by his parent. It does not thereby become a mere *spes successionis*. The amount may be uncertain, but there is a vested right to whatever may be appointed by the parent under the power.[2]

Corporeal Moveables: Furniture.

Assignation without delivery.

§ 221. No questions arise more frequently or cause more trouble and disappointment than those regarding furniture. A man by ante-nuptial deed dispones his household furniture to his wife and nothing further is done. If then he becomes bankrupt, his trustee will take possession, and the provision intended for the wife is swept away. For no principle is more firmly established and none is more reasonable than this, that to complete a transfer of corporeal moveables there must be a change of possession. *Traditionibus dominia rerum non nudis pactis transferuntur.* In other words the property does not pass *retenta possessione*; according to the French maxim *donner et retenir ne vaut.*

This doctrine is not confined to the case of husband and wife, but is of universal application. In the case supposed, the wife loses the gift simply because she has not complied with the law; the property did not pass to her.[3] "A mere private agreement in words, whether oral or written, without

[1] Kirkland *v.* Kirkland, 18 March, 1886, 13 R. 798.

[2] M'Donald *v.* M'Grigor, 10 March, 1874, 1 R. 817; MacKenzie's Creditors *v.* His Children, *supra*, § 212, note [3].

[3] Brown *v.* Brown's Trustee, 19 Dec. 1850, 13 D. 373; Campbell *v.* Stewart, 13 June, 1848, 10 D. 1280; Shearer *v.* Christie, 18 Nov.

any delivery or change of possession, or anything equivalent to ordinary delivery, we think cannot be sufficient to pass the property of moveable goods out of the husband, and into the wife, to the exclusion of his right and his creditors."[1]

If furniture is the property of the wife it is not affected by husband's bankruptcy.

§ 222. Take the converse case that the furniture is the wife's property exclusive of the jus mariti of her husband—that it is, her paraphernalia. In this case it is not affected by her husband's sequestration,[2] or by the diligence of his creditors.[3] Her separate property is not liable for the payment of his debts; nor will his ostensible ownership of it alter this.[4] The case, it will be remembered, is specially dealt with in the Married Women's Property Act, sec. 1, subsec. 4 and sec. 4, which provides that corporeal moveables belonging to the wife are not to be subject to arrestment, or other diligence of the law, for the husband's debts, although not clearly distinguished from his.[5]

Identification.

§ 223. The only difficulty is identification. In an old case it was laid down by the Court that everything in the possession of the wife must be presumed to be the husband's till the contrary is established;[6] and it was suggested that to

1842, 5 D. 182; Anderson v. Buchanan, 22 Dec. 1848, 11 D. 270; M'Clure's Trustees v. Thomson, 30 June, 1883, 10 R. 1064; Campbell's Trustees v. Whyte, 11 July, 1884, 11 R. 1175.

A policy of assurance under the Married Women's Policies Assurance Scotland Act, 1880, is an exception. *Supra*, § 87.

[1] *Per* curiam in Shearer v. Christie, *supra*, 3 D. at p. 141.

[2] M'Donald or Young v. Lockhart & Co. 26 June, 1855, 17 D. 998; Cameron v. M'Lean, 3 Feb. 1876, 13 S.L.R. 278.

[3] See M'Gill v. M'George, 6 Jan. 1807, 5 Sh. Ct. Rep. 285.

[4] 1 Bell, Com. p. 431 (5th ed., 428 (7th ed.). See the case of furniture belonging to children in the custody of the father. Bell, *Pr.* § 1381. Of Orr's Trustee v. Tullis, 2 July, 1870, 8 M. 936.

[5] See Allan v. Wishart, 1880, 7 Sh. Ct. Rep. 188. *Supra*, § 92.

[6] Macdonald v. Dorg, 1738, M. 3645. To the same effect see Cross v. Glode, 1736, 1 Rep. 174.

This is the rule in France: see the Code de Commerce, Art. 559; and was that of the Civil law, Dig. 24, 1, 31, 1; Code 5, 16, 6.

redargue this presumption there should be an inventory of the wife's property, when it consisted of such articles as household furniture.[1] This would no doubt be useful, but is not essential; and will not protect the furniture if the property is not in the wife.[2] Inventory.

On the other hand the want of an inventory will not change the property if that be the wife's.

Neither was it necessary under the former law that the husband's *jus mariti* should be excluded by contract. It was sufficient if it has been excluded by a third person in making a gift to the wife.[3]

§ 224. Since the passing of the Married Women's Property Act all a wife's wedding presents, napery, furniture, and the like are in the same position as her *paraphernalia* under the old law. It has been held, in the Sheriff Court, that wedding presents, although made to the wife, are really intended for the common use of the spouses, and are not, therefore, the separate property of the wife under the Married Women's Property Act.[4] This may be so in certain cases, but it seems rather a violent presumption in the absence of evidence; and a contrary conclusion has been arrived at in later cases.[5] It is a question of intention, and Wedding presents.

[1] Macdonald *v.* Doig, *supra*. An inventory is one of the modes of proof suggested in the Code de Commerce, see Art. 560; as also in the Roman law, see Hunter's *Roman Law*, p. 150.

[2] Campbell *v.* Stewart, *supra*, p. 161; Brown *v.* Brown's Trustee, *supra*. p. 161.

[3] M'Donald or Young *v.* Loudoun, *supra*. See also Annand *v.* Chessels, 1774, M. 5844, affirmed H. of L. 2 Paton App. Ca. 369.

[4] Strain *v.* Strain, 1885, 2 Sh. Co. Rep. 108.

[5] Duncan *v.* Gerrard, 1888, 4 Sh. Co. Rep. 246; M'Intosh *v.* Macrae, 1887, *ib.* 4. 317. The old rule was that gifts are none the less paraphernal because made to husband and wife jointly, Bracton *De Legibus Angliae*, ii. c. 39 (Rolls series, vol. ii. p. 52).

if it could be shown that any of the articles were really intended for the husband, they would belong to him and would pass to his trustee upon bankruptcy; but in the absence of proof to that effect they will remain the separate estate of the wife.[1]

Principle of wife's separate estate used to defeat creditors.

§ 225. Since the Married Women's Property Act came into force, full advantage has been taken of the rule that the wife's property is not to be seized for the husband's debt: and what between the Act and the abolition of imprisonment for debt, it is almost impossible to recover payment of a debt amongst certain classes of the community. When a messenger-at-arms or sheriff officer proceeds to execute a poinding, he is shown receipts in the wife's name for every article of furniture in the house, and she claims them as hers. Unless, therefore, he disregards these evidences of ownership, which it is not safe to do, the diligence is abortive.[2] Of course, if the furniture is in fact the husband's and not the wife's this device will not protect it, but in the cases in which it is resorted to, the debts are mostly of small amount, and the creditors cannot afford to have the question of fact judicially determined.

Devices for protection of furniture.

§ 226. The furniture, as a rule, is purchased by the husband not by the wife: it is often all that they have in the shape of tangible property, and the loss of it makes a

[1] *In re* Jamieson, *ex parte* Parnell, 5 Morrell, Bank. Ca., p. 34. The Coutumes de Toulouse make a special regulation upon the subject. All things given or sent to the husband on the marriage day or the day before, even although on the part of the wife, were the property of the husband. Coutumes de Toulouse, par A. Tardif, §§ 54, 55, p. 41. Paris, 1884. *Journal de Droit pour servir à l'Enseignement du Théories et Droit.*

[2] As to documents of this kind see Scott v. Hirschfeld, 20 Feb. 1869, 36 S.L.R. 382.

world of difference to them. Various devices are therefore resorted to for its protection against the risks of trade. Sometimes the husband, before the marriage, gives a sum of money to his intended wife or to trustees, and she or they purchase it in their own names. Such a gift is no doubt good in itself, but if, as must necessarily happen, the husband is let into possession, or joint possession, of the property, it would probably be claimed by his creditors, if he became bankrupt, on the ground of reputed ownership. But it is not easy to see why such a claim should be sustained. The case differs from the bare assignation of the furniture itself, as the intended gift there fails for want of delivery, while here there has been actual payment and valid delivery of the money before marriage. If so, the investment, that is the furniture, belongs not to the husband but to the wife. In England it would not pass to the creditors under the doctrine of reputed ownership.[1]

Furniture assigned to trustees.

§ 227. The furniture is often conveyed directly to trustees by ante-nuptial deed. If it is duly delivered and *bona fide* belongs to them, it will be protected, even although it is in the apparent possession of the husband at the time of his sequestration.[2] If the husband has an unprotected liferent in the furniture, that interest passes to the trustee for his creditors; it is valued, and, failing payment from other

[1] Robson, *Law of Bankruptcy*, p. 520 (6th ed.); Yate-Lee and Wace *Law of Bankruptcy*, p. 391 (2nd ed. 1884); Campbell, *Law relating to the Sale of Goods*, p. 98; Davidson's *Precedents*, vol. ii. pp. 817, 1263. The same applies in the case of a post-nuptial settlement, if made for valuable consideration. *Ib.*, and also Ashton *v.* Blackshaw, L.R. 9 Eq. 510; Farrington *v.* Parker, L.R. 4 Eq. 116; *Ex parte* Cox, *in re* Reed, L.R. 1 Ch. D. 302.

[2] See M'Donald or Young *v.* Loudoun, 26 June, 1855, 17 D. 998; Scott *v.* Horsburgh, 20 Feb. 1889, 26 S.L.R. 362; Grieve *v.* Herald, 1889, 5 Sh. Co. Rep. 250.

sources, the trustee is entitled to have so much of the furniture sold as will satisfy the value of the liferent.

Where both house and furniture are the property of the wife, or where the furniture belongs to her, and she is tenant of the house, and pays the rent out of her own separate estate, it has been held in England that the furniture could not be seized for a debt of her husband,[1] and the same rule would seem, on principle, to apply in Scotland.

Disposition of furniture to wife if she survives does not enable her to compete with husband's creditors.

§ 228. A disposition by a husband of his household furniture to his wife, in the event of her surviving him, confers no right upon her, in the event of his sequestration, to compete with his creditors, even although he has died subsequently to the sequestration.[2]

[1] See Duncan *v.* Cashin, L.R. 10, C.P. 534; Jarman *v.* Woolloton, 3 T.R. 618; Haselinton *v.* Gill, 3 T.R. 620.

[2] Darling *v.* Mein, 20 Dec. 1851, 1 Stuart, 233; S.C. 14 D. 296. See also per Lord Fullerton in Campbell *v.* Stewart, 13 June, 1848, 10 D. 1280.

CHAPTER VII.

CONCLUSION.

§ 229. I have thus attempted to state the position of the property of married persons, the rights which they and their children have in reference to it, and how far it can be affected by creditors. The one great change, which has been made in recent years, is that the wife's property remains her own after marriage, and does not go to pay her husband's debts, as heretofore, unless she is directly a party to this. Her whole moveable estate has, by statute, been converted into *peculium*, and is regulated by the law which applies to that kind of property. The husband's right of administration subsists, as of old, except in some small matters, and the wife must still act with her husband's consent, unless advantage is taken of the established practice and his right of administration is excluded by contract.

Great change of recent years is that wife's property remains her own.

Her whole moveable estate is now *peculium*.

§ 230. Legislation has not interfered with provisions, antenuptial or post-nuptial, for wife and children. Much may no doubt be advanced against the policy of family settlement as developed in England, but that practice is unknown in Scotland, and with us the marriage contract is used for the legitimate purpose of protecting the wife's property, of securing a provision for the wife and the children of the marriage

Legislation has not touched provisions.

Marriage contracts are still necessary.

which will be safe against the engagements of the husband, and of conferring upon the spouses more perfect freedom in dealing with their own property than is possible at common law. For these objects marriage contracts remain as necessary as ever—and in some respects more so, considering the new rights which have been conferred upon husbands and upon children, and the increased liability of married women. Lord Blackburn, indeed, when commenting upon the clause of the Married Women's Property Act which reserves the power of settlement by ante-nuptial contract of marriage, says,[1] "it is pretty plain that it was meant to say—'when you are marrying after 1881, that is after this Act has come into force, it is your own fault if you do not, by ante-nuptial contract, provide for what is expedient.'"

Difficulty in ascertaining the law.

§ 231. Provisions still remain the subject of contention between trustees, beneficiaries, and creditors. On the one hand, there is the natural and reasonable desire of man and woman to set aside something to fall back upon in the day of adversity, and for the maintenance of the weak and unprotected after they themselves are gone; on the other hand, there is the jealousy of creditors to secure that these estimable ends be not abused and made an instrument of fraud. The result depends upon the time when the obligations have been undertaken, the nature of these obligations, and the skill with which the deeds embodying them have been prepared. It is not easy for the trained lawyer to say what the law is, and mistakes are often made. It is almost impossible for the parties interested to ascertain, for themselves, what the law permits, or how the ends they contemplate are to be effected. It is almost equally impossible for creditors or for a

[1] In Paterson *v.* Poe, L.R. 8 App. Ca. at p. 681; 10 R., H. of L. at p. 74.

trustee for creditors to ascertain, without professional assistance, whether the money which a bankrupt has set aside under marriage contract belongs to his family or to them. Questions between creditors and provisees are constantly being agitated as to which there should be no doubt.

Suggested statute.

§ 232. The Act of 1881 allows persons married prior to its date to take advantage of its provisions, by means of advertisement and registered deed. There seems to be no difficulty in framing a statute defining, and, if need be, amending the law relating to family provisions, and enabling all interested to adopt certain portions of it. The Married Women's Policies of Assurance Act is not a model of draftsmanship, but it allows a husband to do certain specific things in a defined manner, and creditors can judge for themselves whether the thing authorized has been done. An Act more general in its terms, and more carefully framed, would be of great benefit to the community, and would fitly supplement legislation upon the subject of the property of married persons.

APPENDIX

CONTAINING

STATUTES, WITH NOTES

APPENDIX.

No. I.

1503, c. 77 (c. 22, ed. Thomson).

Anent the exceptions proponed anent Widowes, in hindring of them of their teirces.[1]

Item.—It is statute and ordained, anent the exceptions proponed against widowes, persewand and followand their brieves of teirce, or the profite of their teirce, quhilk is ofttimes proponed against thay widowes, that they were not lauchful wives to the persones their husbandes, be quhome they follow their said teirce; That therefore, quhair the matrimonie was not accused in their life-times, and that the woman askand this teirce, beand repute and halden as his lauchful wife in his lifetime, sall be teirced, and bruik her teirce, but ony impediment or exceptions to be proponed against her, ay and quhil it be clearely decerned, and sentence given, that scho was not his lauchful wife, and that scho suld not have ane lauchful teirce therefore.

[1] See Ersk. 1. 6. 6; 2. 9. 50.

No. II.

1661, c. 32 (c. 244, ed. Thomson).

Act concerning Heritable and Moveable Bonds.[1]

Our Soveraign Lord, with advice and consent of His Estates of Parliament, for many just and reasonable causes[2] moving Him, Statutes and Ordains, That all Contracts and Obligations for Sums of money payable[3] to parties at any time, made and dated since the sixteenth day of November, one thousand six hundred and fourty-one,[4] or to be made in time coming, containing clauses for payment of Annual-rent and Profit, are, and shall be, holden and interpret to be Moveable

Bonds,[5] except in these cases following; viz. That they bear an express obliegement to infeft[6] or that they be conceived in favours of Heirs and Assignes, secluding Executors,[7] in either of which cases, Ordains the Sums to be Heritable, and to pertain to the Heir;[8] otherwayes to be confirmed by the Executor,[9] and to appertain to the nearest of Kin, and to the Defunct's Executors and Legators, according to the Law aud practick of Moveables, Declaring alwayes, that all such Bonds, *quoad fiscum*,[10] shall remain in the same condition as they were before the said sixteenth of November, one thousand six hundred and fourty-one, not to fall under the compass of single Escheat, nor shall any part thereof pertain to the Relict, *jure relictae*,[11] where the Bonds are made to the Husband, nor to the Husband,[12] *jure mariti*, where the Bonds are made to the Wife, unless the Relict, or Husband, have otherwayes right and interest thereto, Declaring nevertheless, that this provision shall no way prejudge Wife, nor Husband, and their Executors, of their respective Titles and interests to the by-gone Annual-rents of the said Bonds, resting before either of their deaths.

[1] *Supra*, §§ 11, 56, 97. As to this statute, see Ersk. 2. 2. 10-13; Ross, *Lect.* i., 49; Kames, *Elucidations*, Art. 36, p. 298 (ed. 1800); Bell, *Pr.* § 1495; Duff, *Treatise on Deeds*, p. 6 *et seqq.*; Fraser, *Husband and Wife*, i. 717; Gray *v.* Walker, 11 March, 1859, 21 D. 709; Downie *v.* Downie's Trustees, 14 July, 1866, 4 M. 1067.

[2] The preamble of the original Act, 1641, c. 57 (*infra*, note [4]), explains that the provisions of law for younger children are scanty; that the generality of people, in lending their money, had no intention to disappoint their younger children; that their heirs profit by their ignorance; and that a number of orphan and fatherless children are disappointed of their natural portion, are brought to poverty and misery, and forced to become beggars, which is often found by pitiful experience; and therefore it enacts that all contracts and bonds for sums of money, though with the condition of payment of annual-rent or profit, shall pertain to the bairns and nearest of kin, unless sasine shall have followed in the lifetime of the creditor, or that executors are excluded or the bond contains an obligation to infeft.

[3] The Act deals with the interest of the creditor only. Hence Lord Kames holds that bonds bearing interest are moveable *quoad creditorem*, but heritable *quoad debitorem*. *Elucidations*, p. 303.
This is made plain in the Titles Act of 1868—*infra*, p. 190, but it does not affect the present statute.

[4] This statute is thus retrospective, and took effect as from 16 November, 1641. Its provisions were originally enacted by 1641, c. 57. The whole statutes from 1640 were rescinded at the Restoration, but the effect of the present statute is to put the Act of 1641 much in the same position as if it had been excepted from the rescission.

[5] A moveable bond was that which was made to the creditor by simple bond, for payment of the money at a term, with a penalty, and did not contain obligement to infeft in an annualrent, *nor to pay an annualrent to the creditor* as well not infeft as infeft. (Hope, *Minor Practicks*, Tit. iii., § 35, p. 157; ed. 1734.)

At common law personal bonds are moveable; but when the term of payment of a bond is at a distant or uncertain date it is heritable *ab initio*, the presumption being that the creditor intended the loan as a permanent investment, or *bonum stabile*, as it was termed by the old writers.

Rights having a *tractus futuri temporis*, *e.g.* a liferent or an annuity, are heritable (Ersk. 2. 2. 6.). In Philp *v.* Corrie, 1765, 5 Br. Sup. 469, 908, Lord Pitfour explained that *tractus futuri temporis* applied only to payments at different periods, as an annuity; not to debts payable *simul et semel*, at whatever distance of time.

The quality of a bond is likewise affected by an obligation to pay annual rent or interest. If a bond is payable within a period that does not render it heritable as having a *tractus futuri temporis*, and does not contain a clause of interest, it is moveable. If interest is stipulated for, the principal still remains moveable until the term of payment mentioned in the bond (Dick *v.* Ker, 1668, M. 3629; Meuse *v.* Executors of Craig, 1748, M. 5506), so that if the creditor dies *ante eventum termini* it is moveable. But if the creditor does not demand payment at the date of payment, the bond thereafter becomes heritable, because it is presumed he intended to treat it as a permanent investment. It was the payment of interest which gave it the heritable character, and so it did not assume that character until the date when the payment of interest commenced. Gray *v.* Walker, *supra*, note [1].

The object of the statute is to make all personal bonds moveable notwithstanding a clause of interest, save where it is otherwise stipulated, and in certain excepted cases.

The statute deals only with the case of bonds having a clause of interest and does not touch bonds having a *tractus futuri temporis*. These remain heritable.

[6] *I.e.* in particular subjects, Ersk. 2. 2. 12; Fraser, *Husband and Wife*, i. p. 723; Hughson *v.* Hughson, 22 Nov. 1822, 21 F.C. 26, and in Bell's *Illustrations*, ii. p. 232.

[7] They then become heritable by destination, and belong to the heir *in omni eventu*, although the creditor dies before the term of payment, Muir *v.* Muirs, 1687, M. 5524; Crawford *v.* Earl of Traquair, 1692, M. 5525.

[8] See 31 and 32 Vict. c. 101. § 117, *infra*, p. 190.

[9] A bond treated as heritable, simply because it contained a clause of interest, was deemed heritable in every respect. The heir of the creditor made up his title to it, after the term of payment, by a general service; the heir of the debtor, not the executor, was ultimately liable; it was attached by adjudication, not by arrestment; and was subject to the law of death-bed. Kames, *Elucidations*, p. 298; Duff on *Deeds*, p. 6; Ross *v.* Ross, 4 July, 1809. Hence when the Act declares that such bonds are to be treated as moveable it provides that they are to be confirmed by the executor.

See 31 and 32 Vict. c. 101, § 117, *infra*, p. 190, note; and Hare, 25 Nov. 1889, 17 R. 105.

[10] *Quoad fiscum.* By *fiscus* the Romans understood the crown-revenue; and by the word *fisk* in this statute is meant the Crown's right to the moveable estate of persons denounced rebels on letters of horning. It will be remembered that until the passing of the Act 20, Geo. II., c. 50, the casualties of single and liferent escheat were incurred by horning and denunciation for payment of a civil debt, and that it was by a gift of the escheat, from the Crown, that creditors obtained possession of their debtor's moveable estate. The evils of this system, which led to the passing of the

above enactment, were pointed out in a pamphlet by William Logan of Logan (published anonymously), *Superiorities Display'd:* Edinburgh, 1746, 8vo: and in *A Letter to an English Member of Parliament from a Gentleman in Scotland:* London, 1746, 8vo, also ascribed to Logan. An attempt to vindicate the existing system was made in *An Essay upon Feudal Holdings:* London, 1747, 8vo, by Andrew MacDouall, Lord Bankton.

Heritable bonds do not fall under the single escheat. Clerk *v.* Stewart, 1629, 1 B. Sup. 298. The statute preserves the *status quo* as regards these. Its object was to enlarge the fund for younger children, not to add to the caducary revenue of the crown, or the estate available for creditors.

[11] The case of Downie *v.* Downie's Trustees, *supra*, note [1], was a case as to *jus relictae*. The subject in dispute was a mortgage of the Glasgow Water-Works Commissioners, dated 11 March, 1858, and payable 15 May, 1861, with interest, at 4 °/₀, until paid, payable half-yearly at Martinmas and Whitsunday. It bore that the loan might by agreement remain after maturity for a further period at a rate of interest to be agreed on. The court held that this was a loan for a tract of time [but this statement is open to criticism, *supra* note [5]], and bearing interest payable periodically before the arrival of the term of payment of the principal, and was the kind of bond to which the statute applies, and therefore heritable in a question regarding *jus relictae*.

In Gray *v.* Gordon, 1666, M. 3629, a bond was found heritable, *quoad fiscum*, the term of payment being distant and interest payable in the interim.

As to *jus relictae* see also Gray *v.* Walker, *supra*, note [1]; Meuse *v.* Executors of Craig, *supra*, note [4]; Philp *v.* Corrie, 1765, M. 5772, 5 Br. Sup. 469, 903, 908; Storrar *v.* Creditors of Lidster, 1773, 5 Br. Sup. 469.

[12] Such bonds will not fall to a surviving husband *jure relicti*, 44 and 45 Vict. c. 21, § 6, *infra*, p. 200; *supra*, § 97.

No. III.

1681, c. 10 (c. 12, ed. Thomson).

Act concerning Wives' Terces.[1]

Our Soveraigne Lord Considering that sometimes through the ignorance, and inadvertencie of some Writers and Nottars,[2] Clauses are insert in contracts of Marriage, containing provisions by Husbands in favours of their Wives, without mentioning the terce that is due to her by Law, or expressing the provision to be granted in satisfaction of the terce; whereby occasion is given to Relicts to claim a terce out of their Husbands estates by and attour the provision conceived in their favours contrary to the meaning and intention of the parties contracters. For Remeed whereof, the Kings Majesty, with advice and consent of the Estates of Parliament, Statutes and Ordains, That in time coming where there shall be a particular provision, granted by an Husband in favours of his Wife, either in a contract of Marriage, or some other writ,[3] before or after the marriage; That the Wife shall be thereby secluded from a terce out of any lands or annual-rents be-

longing to her Husband, unless it be expressly provided in the contract of Marriage, or other Writ containing the said provision, that the Wife shall have right to a terce, by and attour the particular provision, conceived in her favours: But prejudice alwaies to the Lords of Session, to determine as to Contracts of Marriage, or provisions already made, according to the former Law and Custom.

[1] Supra, § 114. Ersk. 2. 9. 45; 3. 9. 16; *Stair*, 2. 6. 17; Fraser, *Husband and Wife*, ii., 1113. As to the passing of the statute see Craigleith *v.* Prestongrange, 1681, M. 15845; and per Lord Loughborough in Lowthian *v.* Ross, 1797, 3 Pat. App. at p. 628.
The provisions of the statute were discussed in Jankouska *v.* Anderson, 1791, M. 6457 and 15868; Ross *v.* Aglianby [reported as Lowthian *v.* Ross, in the House of Lords], 1797, M. 4631 and 15874, 3 Paton, App. Ca., 621.

[2] They are also blamed, 1672, c. 19.

[3] That is some deed of a conventional character, not a unilateral deed, as for example a testamentary deed. Lowthian *v.* Ross, *supra*.

No. IV.

18 VICTORIA, c. 23.

An Act to alter in certain respects the Law of Intestate Moveable Succession in Scotland.[1]

[*25th May*, 1855.]

Be it enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows:[2]

The Issue of a Predeceasing Next of Kin shall come in the Place of their Parent in the Succession to an Intestate.

1. In all Cases of Intestate Moveable Succession[3] in *Scotland* accruing after the passing of this Act,[4] where any Person who, had he survived the Intestate,[5] would have been among his Next of Kin,[6] shall have predeceased such Intestate, the lawful Child or Children of such Person so predeceasing shall come in the Place of such Person, and the Issue of any such Child or Children, or of any Descendant of such Child or Children, who may in like Manner have predeceased the Intestate, shall come in the Place of his or their Parent predeceasing, and shall respectively have Right to the Share of the Moveable Estate of the Intestate to which the Parent of such Child or Children or of such Issue, if he had survived the Intestate, would have been entitled:[7] Provided always, that no Representation shall be admitted among Collaterals[8] after Brothers and Sisters Descendants, and that the Surviving Next of Kin of the Intestate claiming the Office of Executor shall have exclusive Right thereto, in preference to the Children or other Descendants of any predeceasing Next of Kin,[9] but that such

Children or Descendants shall be entitled to Confirmation when no Next of Kin shall Compete for said Office.[10]

[1] *Supra*, § 54. The hardship of the common law was pointed out by the Law Amendment Society of Glasgow in 1851.

[2] This is a remedial statute, and to be construed in reference to the mischief intended to be remedied. Turner *v.* Couper, 27 Nov. 1869, 8 M. 222.

"The succession in moveables from the intestate belongeth to the nearest of kin, who are the defunct's whole agnates, male or female, being the kinsmen, of the defunct's father's side of the nearest degree, without primogeniture, or right of representation; and therein those joined to the defunct by both bloods, do exclude the agnates by one blood." (Stair, 3. 8, 31.)

The object of this part of the statute was to take away the hardship which arose when, of several persons who would have been all equally next of kin of an intestate one or more had predeceased the intestate leaving children, who, as the law stood before the passing of the Act, were excluded from the succession, as they could not take with surviving next of kin. Turner *v.* Couper, *supra*.

"We are always hearing it said that the statute introduced the representation of heritage into moveable succession. That is the shorthand way in which popularly the statute is described. But the statute does no such thing." Per Lord Kinloch, *Ib.*, at p. 225. This is too strongly put. The statute intended to introduce to the extent it allows, the representation which Lord Stair, *supra*, says was excluded.

In England grandchildren were also formerly excluded from the customary shares of their parents, according to the customs of the province of York and city of London.

The Act was intended to make the rule of the law of Scotland similar, to a certain extent, to that of the English Statute of Distributions, 22 and 23, Car. II. c. 10. That statute is founded upon the 118th Novel of Justinian (published in 543), and amended by the 127th Novel; and allows representation amongst *descendants* to the remotest degree. Among collaterals representation does not extend beyond brothers' and sisters' children.

[3] See the interpretation clause, sec. 9, *infra*, p. 181.

[4] The Act therefore is not retrospective. See note to sec. 6. But it may incidentally have a retrospective effect. Ewart *v.* Cottom, 6 Dec. 1870, 9 M. 232.

[5] These words limit the scope of the statute to this particular case. It does not apply to every case of intestate succession, but only to those cases where any person *who, had he survived the intestate*, would have been among his next of kin. Turner *v.* Couper, 27 Nov. 1869, 8 M. 222.

Therefore where the nearest surviving relatives of an intestate are his nephews and nieces, the intestate succession falls to be divided among them in their own right as his next of kin *per capita*, and not as representatives of their deceased parents *per stirpes*. *Ib.*

[6] Next of kin and nearest of kin were formerly synonymous. Bell, *Pr.* § 1861. In the common law of Scotland, next of kin and heirs *in mobilibus* meant one and the same thing. See 1661, c. 32, *supra*, p. 173. Cf. 31 and 32 Vict. c. 101, § 117, *infra*, p. 100.

The term "next of kin," as here used in the present statute, denotes those persons who would have been the legal heirs of the intestate under the old law; but it is no longer equivalent to legal heirs *in mobilibus*, inasmuch as it does not include all the members of that class. Per Lord Watson in Hood *v.* Murray (otherwise Gregory's Trustees), 1889, L. R. 14 App. Ca. 124,

reversing the Court of Session, 14 R. 368, and overruling Haldane's Trustees *v.* Murphy, 15 Dec. 1881, 9 R. 269. In its legal sense the expression is still applicable to those members of the class who would have been the sole heirs before the passing of the Act, and are now preferably entitled to administer the succession of the intestate. *Ib.*

As used in a testamentary or other deed the words may apply to a hypothetical and not to the legal class. It is a matter of interpretation. The expressions "nearest heirs and successors," and my own "nearest of kindred" have been construed as different from "next of kin" in its legal sense, because there was something to show that such was the testator's meaning. Nimmo *v.* Murray's Trustees, 3 June, 1864, 2 M. 1144; Maxwell *v.* Maxwell, 24 Dec. 1864, 3 M. 318; Connell *v.* Grierson, 14 Feb. 1867, 5 M. 379; Young's Trustees *v.* James, 10 Dec. 1880, 8 R. 242. Elphinstone, *Interpretation of Deeds*, p. 304.

[7] The statute applies only to the case where there are certain persons who, at the death of the intestate, stand in the relation of the next of kin, and another person or persons who would have stood in the same relation with them has or have predeceased. Per Inglis, L.P., in Turner *v.* Couper, 27 Nov. 1869, 8 M. at p. 224. Hence where the nearest surviving relations of an intestate are his nephews and nieces, the intestate succession falls to be divided amongst them in their own right, as his next of kin *per capita*, and not as representatives of their deceased parents *per stirpes*. *Ib.*

Where the statutory distribution prevails, a grand-daughter of a deceased sister of an intestate will take equally with his surviving brother. Nimmo *v.* Murray's Trustees, *supra*, note 6.

Under a legacy to the executors of a person deceased, who were his sons, the children of sons who died prior to the death of the person who bequeathed the legacy are entitled to participate along with the surviving sons. Ewart *v.* Cottom, 6 Dec. 1870, 9 M. 232.

[8] *I.e.*, not brothers and sisters merely, but other collaterals related through a common ancestor. Representation is, however, limited to the descendants of brothers and sisters, and is not to take place amongst the descendants of collaterals more remote. Hence cousins german of an intestate are entitled to succeed as collaterals, but children of a predeceasing cousin german cannot claim. Ormiston *v.* Broad, 11 Nov. 1862, 1 M. 10. See Robertson, *Treatise on Personal Succession*, p. 333 (Edinburgh, 1836).

[9] The daughter of a brother of an intestate, *i.e.*, his niece, is not properly described as one of the next of kin, when a brother of the intestate survives. Dowie *v.* Barclay, 18 March, 1871, 9 M. 726.

[10] If the next of kin hang back and do not claim the office, it is competent to the representatives of a deceased next of kin to come forward and be confirmed. Ormiston *v.* Broad, *supra*, note [8]; Dowie *v.* Barclay, *supra*, note [9].

It is not, however, correct to describe such a representative as one of the next of kin.

Issue of predeceasing Heir succeeding to the Intestate's Heritage may collate, but other Issue not excluded

2. Where the Person predeceasing would have been the Heir in Heritage of an Intestate leaving Heritable as well as Moveable Estate had he survived such Intestate, his Child, being the Heir in Heritage of such Intestate, shall be entitled to collate the Heritage to the Effect of claiming for himself alone, if there be no other Issue of the Predeceaser, or for himself and the other Issue of the Predeceaser, if there

by his not collating from claiming out of Moveable Estate Difference between Value of Heritage and Share their Parent would have taken on Collation.

be such other Issue, the Share of the Moveable Estate of the Intestate which might have been claimed by the Predeceaser upon Collation if he had survived the Intestate; and Daughters of the Predeceaser, being Heirs Portioners of the Intestate, shall be entitled to collate to the like Effect; and where, in the Case aforesaid, the Heir shall not collate, his Brothers and Sisters, and their Descendants in their Place, shall have Right to a Share of the Moveable Estate equal in Amount to the Excess in Value over the Value of the Heritage of such Share of the whole Estate, Heritable and Moveable, as their predeceasing Parent had he survived the Intestate would have taken on Collation.[1]

[1] Bell, *Pr.*, §§ 1911, 1911 A (9th edition).

Father to succeed to Extent of One Half when no Issue.

3. Where any Person dying intestate shall predecease his Father without leaving Issue, his Father shall have Right to One Half of his Moveable Estate, in preference to any Brothers or Sisters or their Descendants who may have survived such Intestate.[1]

[1] But his father is not hereby constituted one of his next of kin. He is however entitled "qua father" to be decerned executor of the intestate, and in case of his death his representative, *e.g.*, his executor, is in the same position. If the office of executor is also claimed by one of the next of kin there will be a joint decerniture. Webster *v.* Shiress, 25 Oct. 1878, 6 R. 102; Muir, 3 Nov. 1876, 4 R. 74—*Infra*, sec. 4. Cf. the case of a surviving husband under the Married Women Property (Scotland) Act, 1881, § 6 (post p. 200).

This does not affect the father's common law right to the whole estate as nearest ascendant, where the intestate dies without issue or without leaving brothers and sisters or their descendants.

Where Father has predeceased, Mother to succeed to Extent of One Third.

4. Where an Intestate dying without leaving Issue whose Father has predeceased him shall be survived by his Mother,[1] she shall have Right to One Third of his Moveable Estate, in preference to his Brothers and Sisters or their Descendants, or other Next of Kin of such Intestate.[2]

[1] By the common law of Scotland the mother is not allowed to succeed to her own children, and all relations through her were excluded. *Supra*, p. 38; *infra*, sec. 5, note.

[2] She is entitled to the office of executrix *qua* mother, or to a joint decerniture if it is claimed by the next of kin. She is not entitled to the office *qua* next of kin. Muir, 3 Nov. 1876, 4 R. 74. *Supra*, sec. 3.

Succession by Brothers and Sisters uterine.

5. Where an Intestate dying without leaving Issue, whose Father and Mother have both predeceased him, shall not leave any Brother or Sister german or consanguinean, nor any Descendant of a Brother or Sister german or consanguinean, but shall leave Brothers and Sisters uterine, or a Brother or Sister uterine, or any Descendant of a Brother or Sister uterine, such Brothers and Sisters uterine and such Descendants in place of their predeceasing Parent shall have Right to One Half of his Moveable Estate.

[1] By the law of England, following the civil law, the relations on the mother's side share equally with the relations on the father's side; and relations nearer in blood exclude these more remote irrespective of whether they are connected through the mother or the father.

By the common law of Scotland all relations claiming through the mother of the intestate are excluded. The enactment in this section is the only relaxation of the rule. *Supra*, p. 38.

On a Wife predeceasing her Husband her Representatives to have no Claim on the Goods in communion.

6. Where a Wife shall predecease her Husband, the Next of Kin, Executors, or other Representatives of such Wife, whether testate or intestate, shall have no Right to any Share of the Goods in Communion, nor shall any Legacy or Bequest or Testamentary Disposition thereof by such Wife affect or attach to the said Goods or any portion thereof.[1]

[1] *Supra*, § 35, 54; Fraser, *Husband and Wife*, ii. p. 1528.

This section has no retrospective effect. Hence it does not apply when the dissolution of the marriage took place by the predecease of the wife prior to 25th May, 1855. Kennedy *v.* Bell, 2 Feb. 1864, 2 M. 587.

To secure ministers from losing their libraries in their lifetimes, it was enacted, that ministers' books shall not fall under the executry of their predeceasing wives. 1644, c. 19; but the Act was rescinded. *Supra*, p. 32.

Not to affect Rights of Spouses on Dissolution of Marriage in certain Cases.

7. Where a Marriage shall be dissolved before the Lapse of a Year and Day from its Date, by the Death of One of the Spouses, the whole Rights of the Survivor and of the Representatives of the Predeceaser shall be the same as if the Marriage had subsisted for the Period aforesaid.[1]

[1] *Supra*, §§ 32, 34, 54.

Part of Act of Parliament of Scotland, 1617, c. 14, repealed.

8. So much of an Act of the Parliament of *Scotland* passed in the Year One thousand six hundred and seventeen, and intituled *Anent Executors*, as allows Executors nominate to retain to their own Use a Third of the Dead's Part in accounting for the Moveable Estate of the Deceased, is hereby repealed, and Executors nominate shall, as such, have no Right to any Part of the said Estate.[1]

[1] The Act 1617, c. 14, was corrective of the former law under which the nomination of an executor vested him with right to the whole moveable property of the deceased as an incident of his office. That statute limited this right to one-third of the estate after payment of debts. This third was looked upon as a commission or remuneration to the executor for his trouble. Grant *v.* Murray, 28 Nov. 1849, 12 D. 201. It was decided in that case that the Act of 1617 was not in desuetude, and this judgment was affirmed by the House of Lords in 1852, 1 M'Q. 178; 1 Paterson App. Ca. 132. The modified right was extinguished by the present enactment.

Interpretation of Terms.

9. The Words "Intestate Succession" shall mean and include Succession in Cases of partial as well as of total Intestacy; "Intestate" shall mean and include every Person deceased who has left undisposed of by Will the whole or any Portion of the Moveable Estate on

which he might, if not subject to Incapacity, have tested : " Moveable Estate " shall mean and include the whole free Moveable Estate on which the Deceased, if not subject to Incapacity, might have tested, undisposed of by Will, and any Portion thereof so undisposed of.[1]

[1] *I.e.* The statute deals only with dead's part ; *jus relictae* and *legitim* form no part of the intestate's estate, but belong to wife and children respectively in their own right. *Supra*, § 42. They do not admit representation. *Supra*, § 179.

The Bill as brought in contained a clause providing that the issue of a predeceasing child should represent such child in reference to legitim, but it was struck out in its passage through Parliament.

No. V.

24 and 25 VICTORIA, c. 86.

An Act to amend the Law regarding Conjugal Rights in Scotland.[1]

[*6th August*, 1861.]

Whereas it is expedient to amend the Law of *Scotland* relating to Husband and Wife : Be it therefore enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows :

A Wife deserted by her Husband may apply for an Order to protect Property which she has or may acquire by her own Industry, or which she may succeed to.

1. A Wife deserted[2] by her Husband may, at any Time after such Desertion, apply by Petition to any Lord Ordinary of the Court of Session, or in the Time of Vacation to the Lord Ordinary on the Bills,[3] for an Order to protect Property[4] which she has acquired or may acquire by her own Industry[5] after such Desertion, and Property which she has succeeded to or may succeed to or acquire Right to after such Desertion, against her Husband or his Creditors, or any Person claiming in or through his Right ; and the Lord Ordinary shall appoint such Petition to be intimated in the Minute Book of the Court of Session, and to be served upon the Husband ; and the Husband, or any Creditor of the Husband, or any other Person claiming in or through his Right, shall be entitled to lodge Answers to the said Petition, and if the Husband be furth of *Scotland*, the Petition shall be executed edictally against him on an Induciæ of Twenty-one Days ; and upon considering such Petition the Lord Ordinary shall require Evidence of such Desertion, and on being satisfied thereof pronounce an Interlocutor giving to the Wife Protection of her Property as aforesaid against the Husband and all Creditors or Persons claiming under or through him ; and if Answers be lodged to the said Petition, the Lord Ordinary may, on considering the

same, and, if he consider it necessary, after hearing Parties, allow a Proof to them of their respective Averments, which Proof he shall take himself, and either write the Evidence with his own hand, in which Case it shall be read over to the Witness by the Judge, and signed by the Witness, if he can write, or the Lord Ordinary shall record the Evidence by dictating it to a Clerk, in which Case it shall, when taken down, be read over and signed as above ; or the Lord Ordinary shall cause the Evidence to be taken down and recorded by a Writer, skilled in Shorthand Writing, in manner after mentioned, and it shall be competent to the Lord Ordinary, in special Cause shown, instead of taking such Proof, to grant a Commission to take said Proof elsewhere than in *Edinburgh*, in which Case he may pronounce an Interlocutor setting forth such special Cause, and granting Commission to take such Proof, and if satisfied after Proof of the Fact of such Desertion, and that the same was without reasonable Cause, he shall pronounce an Interlocutor giving to the Wife Protection as aforesaid, and he shall appoint Intimation of the said Interlocutor having been pronounced to be made in One or more Newspapers published within the County within which the Wife is resident, or in such other Newspapers as the Lord Ordinary may appoint.

[1] *Supra*, § 61 *et seqq.* Cf. The Married Women's Property (Scotland) Act, 1881, § 5, *post* p. 200.

[2] *Supra*, § 62.

[3] And by the Act of 1874, to the Sheriff: *post* p. 187.

[4] Property includes and applies "to all property falling under the *jus mariti*." See the interpretation clause, sec. 19 of the Act.

[5] *Supra*, § 62.

Husband or Creditor may apply by Petition for Recal of Order.

2. It shall be lawful for the Husband, or any Creditor or other Person claiming in or through his Right, if such Creditor, Husband, or other Person have not lodged Answers as aforesaid, to apply by Petition to the Lord Ordinary by whom such Order was made for the Recal thereof; and the Lord Ordinary shall appoint such Petition to be answered by the Wife, and thereafter dispose of the Application as he shall think just ; but such Recal shall not affect any Right or Interest onerously and *bona fide* acquired by any Third Party from the Wife before said Recal ; and the Lord Ordinary shall direct that Publication of his Interlocutor be made in manner herein-before provided.

Interlocutors may be reviewed.

How long Order of Protection

3. All Interlocutors of the said Lord Ordinary may be brought under Review of either Division of the Court of Session, by lodging and boxing within Twenty-one Days after the pronouncing of such Interlocutors, if in Session ; and if the said Twenty-one Days shall expire during Vacation, by lodging in the Bill Chamber a Reclaiming

to continue operative.

Note and boxing the same at the First Box Day after the Expiry of the said Twenty-one Days: Provided always, that, notwithstanding such Reclaiming Note, the Interlocutor of the Lord Ordinary granting Protection shall take effect when intimated as aforesaid, unless the Lord Ordinary, either at the Time of the pronouncing thereof or within Forty-eight Hours thereafter, order that his Interlocutor shall not take effect till the advising of the Reclaiming Note, or such other Period as he may think fit; and such Order of Protection shall, where there has been Appearance by the Husband, continue operative until such time as the Wife shall again cohabit with her Husband, or until the Lord Ordinary, upon a Petition by the Husband, shall be satisfied that he has ceased from his Desertion, and cohabits with his Wife; and the Lord Ordinary may require him to find Security for such Period as may be appointed, that he shall continue to cohabit with her; and upon the Lord Ordinary being so satisfied, and Security found, if required, he shall recal the Order of Protection; but such Recal shall not affect any Right or Interest acquired by the Wife while the said Order subsisted, which Right and Interest shall remain vested in her, exclusive of her Husband's Jus mariti and Right of Administration;[1] nor shall it affect any Right or Interest acquired by a Third Party during such Period, or any Third Party through or from her, while the said Order subsisted; and until such Order be recalled it shall not be competent for the Husband to institute an Action of Adherence against his Wife; and the Lord Ordinary shall direct that Publication of its Recal be made in manner herein-before provided.

No Action of Adherence competent while Order subsists.

[1] This is a much larger protection than is accorded by the Married Women's Property (Scotland) Act, 1881, as under it the husband's right of administration remains intact. *Supra*, §§ 71, 90, 101, 106.

After Interlocutor of Protection is pronounced, Property of Wife to belong to her as if unmarried.

4. After an Interlocutor of Protection is pronounced, and duly intimated, the property of the Wife as aforesaid shall belong to her as if she were unmarried: Provided always, that such Protection shall not extend to Property acquired by the Wife of which the Husband or his Assignee or Disponee has before the Date of presenting said Petition obtained full and complete lawful Possession,[1] nor shall such Protection affect the Right of any Creditor of the Husband over Property which he has before the Date thereof duly attached by Arrestment, followed by a Decree of Forthcoming, or which such Creditor has before the said Date duly poinded, and of which he has carried through and reported a Sale.

[1] *Supra*, § 66. See Johnson *v.* Lauder, L. R. 7 Eq. 228.

Order of Protection to have effect of

5. If any such Order of Protection be made and intimated, it shall have the Effect of a Decree of Separation *a mensa et thoro* in regard to

the Property, Rights, and Obligations of the Husband and of the Wife, and in regard to the Wife's Capacity to sue and be sued. Decree of Separation.

6. [1]After a Decree of Separation *a mensa et thoro* obtained at the instance of the Wife, all Property which she may acquire, or which may come to or devolve[2] upon her, shall be held and considered as property belonging to her in reference to which the Jus mariti and Husband's Right of Administration are excluded, and such Property may be disposed of[3] by her in all respects as if she were unmarried, and on her Decease the same shall, in case she shall die intestate, pass to her Heirs and Representatives, in like Manner as if her Husband had been then dead; provided that if any such Wife should again cohabit with her Husband all such Property as she may be entitled to when such Cohabitation shall take place shall be held to her separate Use,[4] and the Jus mariti and Right of Administration of her Husband shall be excluded in reference thereto, subject, however, to any Agreement in Writing made between herself and her Husband; and the Wife shall, while so separate, be capable of entering into Obligations, and be liable for Wrongs and Injuries, and be capable of suing and being sued, as if she were not married; and her Husband shall not be liable in respect of any Obligation or Contract she may have entered into, or for any wrongful Act or Omission by her, or for any Costs she may incur as Pursuer or Defender of any Action, after the Date of such Decree of Separation and during the Subsistence thereof; provided that where upon any such Separation Aliment has been decreed or ordered to be paid to the Wife and the same shall not be duly paid by the Husband, he shall be liable for Necessaries supplied for her Use.

In case of Separation the Property of the Wife to belong to her exclusively of the Jus mariti and Right of Administration;

also for Purposes of Contract and suing.

. . . . . .

[1] Corresponds with § 25 of the English Act, 20 and 21 Vict. c. 85. As to the effect of the clause upon marriage settlements, see *In re* Insole, L. R. 1 Eq. 470; *In re* Coward and Adams Purchase, L. R. 20 Eq. 179; Dawes *v.* Creyke, L. R. 30 Ch. D. 500; Waite *v.* Morland, L. R. 38 Ch. D. 135.

If a married woman after obtaining decree of separation succeeds to property, it will not pass to the trustees of her marriage settlement under a general assignation of *acquirenda*. Dawes *v.* Creyke, *supra*, and the comments on this case in Waite *v.* Morland, *supra*. Whether a married woman after judicial separation is entitled to obtain a conveyance to property bequeathed to her subsequently thereto, freed from restraints applicable to a married woman, is not settled. See Waite *v.* Morland, *supra*.

[2] *I.e.*, pass by succession by law or by will. Parr *v.* Parr, 1 My and K. 648; Earl of Zetland *v.* Lord Advocate, L. R. 3 App. Ca. 505.

Property coming to a married woman does not devolve upon her after the decree, if the succession has opened prior thereto, even although it has not been reduced into possession by the husband. Johnson *v.* Lauder, L. R. 7 Eq. 228.

[3] As to these words, see per Romilly, M. R., *In re* Insole, L. R. 1 Eq. 470.

[4] The English technical expression for property held exclusive of a husband's marital rights. See *supra*, pp. 54, 82; *infra*, p. 194 note [7], p. 196 note [3].

Terce claimable from Burgage Property.

12. The Widow of any Person who shall, after the passing of this Act, die infeft in Property held by Burgage Tenure shall be entitled to Terce therefrom and the like Proceedings as to Service and Kenning before the Sheriff shall be competent in such a Case as are competent with reference to Property in respect of which Terce might have been claimed prior to the passing of this Act.[1]

[1] *Supra*, § 69.

. . . . . .

When a married Woman succeeds to Property, etc., Husband or Creditor not entitled to claim the same.

16. When a married Woman succeeds to Property, or acquires Right to it by Donation, Bequest, or any other Means than by the Exercise of her own Industry,[1] the Husband or his Creditors, or any other Person claiming under or through him, shall not be entitled to claim the same as falling within the Communio bonorum, or under the Jus mariti or Husband's Right of Administration,[2] except on the Condition of making therefrom a reasonable Provision for the Support and Maintenance of the Wife, if a Claim therefor be made on her Behalf; and in the event of Dispute as to the Amount of the Provision to be made, the Matter shall, in an ordinary Action, be determined by the Court of Session[3] according to the Circumstances of each Case, and with reference to any Provisions previously secured in favour of the Wife, and any other Property belonging to her exempt from the Jus mariti: Provided always, that no Claim for such Provision shall be competent to the Wife if before it be made by her the Husband or his Assignee or Disponee shall have obtained complete and lawful Possession of the Property, or, in the Case of a Creditor of the Husband, where he has before such Claim is made by the Wife attached the Property by Decree of Adjudication or Arrestment, and followed up the said Arrestment by obtaining thereon Decree of Furthcoming, or has poinded and carried through and reported a Sale thereof.

[1] *Supra*, §§ 66, 67, 68.

[2] But the statute does not apply if the husband takes in virtue of a contract of marriage or other pactional arrangement. Fraser, *Husband and Wife*, i. p. 835.

[3] The Sheriff's jurisdiction is not extended to this by the Act of 1874.

Court of Session empowered to make Acts of Sederunt.

17. The Court of Session are hereby authorized and empowered to make from Time to Time such Orders and Regulations as to Forms of Process by Acts of Sederunt as they may consider necessary for carrying into execution the Purposes of this Act.

18. All Laws, Statutes, and Usages are hereby repealed in so far as the same are inconsistent with the Provisions of this Act, but no further or otherwise. Repeal of Laws inconsistent with this Act.

19. The following Words and Expressions, when used in this Act, shall, in the Construction thereof, be interpreted as follows, except where the Nature of the Provision or the Context of the Act shall exclude or be repugnant to such Construction; that is to say, the Expression "Lord Ordinary" shall include his Successor; the Word "Property" shall include and apply to all Property falling under the Jus mariti; the Expression "Consistorial Action" shall include Actions of Declarator of Marriage, of Declarator of Nullity of Marriage, of Declarator of Legitimacy and Bastardy, Actions of Separation *a mensa et thoro*, of Divorce and of Adherence, and of putting to Silence, and Actions of Aliment between Husband and Wife instituted in the Court of Session. Interpretation of Terms.

20. This Act may in all Proceedings be cited as "The Conjugal Rights (*Scotland*) Amendment Act, 1861." Short Title.

21. This Act shall come into operation on the First Day of *November* now next ensuing, and not before. Commencement of Act

No. VI.

37 and 38 Victoria, c. 31.[1]

An Act to amend the Conjugal Rights (Scotland) Amendment Act, 1861.

[16*th July*, 1874.]

Whereas an Act was passed in the twenty-fourth and twenty-fifth years of the reign of Her present Majesty, intituled "An Act to "amend the Law regarding Conjugal Rights in Scotland": 24 & 25 Vict. c. 86.

And whereas the expense of procedure under that Act prevents many persons from availing themselves of its benefits, and it is desirable to amend the same:

Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same.

1. The word "sheriff" shall include sheriff-substitute. Definition of "sheriff."

[1] *Supra*, § 62; Wilson, *Practice of the Sheriff Courts*, p. 394 *et seqq.* (3rd ed. 1883).

Sheriffs jurisdiction extended to applications for orders to protect property of deserted wives and for the recall of such orders.

2. The sheriffs of counties in Scotland shall have all jurisdictions, powers, and authorities necessary for hearing, trying, and determining applications by wives deserted by their husbands for orders to protect property that they have acquired or may acquire by their own industry after such desertion, and property which they have succeeded to or may succeed to or acquire right to after such desertion, against their husbands or creditors of their husbands, or any persons claiming in or through the rights of their husbands, and applications by the husbands of such wives, their creditors, or others claiming in or through the rights of such husbands for the recall of such orders[1]: Provided as follows:

1. All such applications in the sheriff court shall be made by petition in common form, and, subject to any orders and regulations which the Court of Session are hereby authorized to make from time to time as to procedure in such applications, the procedure in every such petition, including the procedure in appeals taken therein within the sheriff court or to the Court of Session, shall, as nearly as may be, be the same as in an ordinary action in the sheriff court:[2]

2. The conditions on which orders to protect property as aforesaid may be granted or recalled in the sheriff court shall be the same as those on which such orders may be granted or recalled in the Court of Session. The provisions of the recited Act relating to the intimation of interlocutors granting or recalling such orders in the Court of Session shall apply to the intimation of such interlocutors when pronounced in the sheriff court; and the effects of the grant or recall of any such order duly intimated shall be the same when made in the sheriff court as when made in the Court of Session:

3. An application for the recall of any such order to protect property granted in a sheriff court shall be competent only when made in the sheriff court to whose jurisdiction the deserted wife is for the time amenable, or in the Court of Session.

   It shall be the duty of the clerk of the court in which any such order was granted, to transmit the process in which it was granted to any other court on receiving written notice from a clerk thereof of the dependence therein of an application for the recall of such order:

[1] The jurisdiction of the Sheriff extends only to protection orders; *i.e.* it embraces only the powers in sec. 1-5 of the Act of 1861.

[2] Forms, see Fraser, *Husband and Wife*, ii. p. 1557; Lees, *Sheriff Court Styles*, p. 109 (2nd ed).

4. It shall not be necessary to print the petition, answer, or evidence in order to the disposal by the Court of Session of any appeal taken thereto from a sheriff court in any application by this Act made competent in the sheriff court:

5. Any warrant of citation granted by a sheriff in any such application may, when necessary, be executed edictally (without the concurrence or authority of the Court of Session) by delivery of a copy thereof at the office of the keeper of edictal citations according to the mode established by the Act passed in the sixth year of the reign of His Majesty King George the Fourth, chapter one hundred and twenty, in regard to the execution edictally of citations on warrants of the Court of Session, and by an act of sederunt of the Court of Session, dated the twenty-fourth day of December one thousand eight hundred and thirty-eight, and by sending a copy thereof by post to the last known address of the person to be cited.

The keeper of edictal citations or his clerk shall register an abstract of every such copy so delivered, in the record for edictal citations by virtue of letters of supplement to persons furth of Scotland to appear before any of the inferior courts of Scotland; and such abstract shall exhibit such particulars as are required to be exhibited in an abstract of any copy citation by law appointed to be made or registered by the said keeper or his clerk.

3. This Act may be cited as the Conjugal Rights (Scotland) Amendment Act, 1874. Short title.

No. VII.

26 and 27 VICT. c. 87.

An Act to consolidate and amend the Laws relating to Savings Banks.

28th July, 1863.

. . . . . .

§ 31. It shall be lawful for the Trustees and Managers of any Savings Bank to pay any sum of money in respect of any Deposit already made or to be made by Married Women, or by Women who may marry after such Deposit, to any such Women, unless the Husband of such Woman shall give to such Trustees or Managers Notice in Writing of his Marriage with such Woman, and shall require payment to be made to him. How Deposits by Married Women may be made and paid.

. . . . . .

No. VIII.

31 and 32 VICTORIA, c. 101.

The Titles to Land Consolidation (Scotland) Act.[1]

31st July, 1868.

Heritable Securities to form Moveable Estate; except where conceived in favour of Heirs, excluding Executors and *quoad fiscum*.

§117. From and after the commencement of this Act[2] no heritable security[3] granted or obtained either before or after that date shall, in whatever terms the same may be conceived, except in the cases hereinafter provided, be heritable as regards the succession of the creditor in such security, and the same, except as hereinafter provided, shall be moveable as regards the succession of such creditor, and shall belong after the death of such creditor to his executors or representatives *in mobilibus*,[4] in the same manner and to the same extent and effect as such security would, under the law and practice now in force, have belonged to the heirs of such creditor: Provided always, that where any heritable security is or shall be conceived expressly in favour of such creditor, and his heirs or assignees or successors, excluding executors, the same shall be heritable as regards the succession of such creditor, and shall after the death of such creditor belong to his heirs in the same manner and to the same extent and effect as is the case under the existing law and practice in regard to heritable securities: And provided also, that where a creditor in any existing or future security recorded, or on which an instrument has followed recorded in the register of sasines, shall desire to exclude executors, it shall be competent for him to do so by executing a minute in the form or as nearly as may be in the form of schedule (DD) hereto annexed, and recording the same in the appropriate register of sasines, and upon such minute being recorded the security to which it refers shall be heritable in the manner and to the extent and effect herein-before provided; and further, provided that where in any existing or future security which has not been recorded, or followed by an instrument recorded in the register of sasines, or where in the case of any conveyance or deed of or relating to such security not recorded in the register of sasines, the creditor shall desire to exclude executors, it shall be competent for him to do so by endorsing a minute, in the form or as nearly as may be in the form of schedule (DD) hereto annexed, on the security or on the deed of conveyance thereof in his favour which has not been recorded as aforesaid, and recording the same, along with such security or with such deed or conveyance as the case may be, in the appropriate register of sasines, and upon such security or deed or conveyance, as the case may be, and minute being so recorded the security shall be heritable in the manner and to the extent and effect herein-before provided and, where execu-

tors shall be excluded in the security, or by minute recorded as aforesaid, the security shall continue to be heritable as regards the succession of the creditor for the time holding such heritable security, until the exclusion of executors shall be removed, which it shall be lawful for such creditor to do either by executing a minute in the form or as nearly as may be in the form of schedule (EE) hereto annexed, and recording the same in the appropriate register of sasines, whereupon the security shall become moveable as regards the succession of such creditor, as provided by this act, or by assigning, conveying, or bequeathing such security to himself or to any other person, without expressing or repeating such exclusion, and upon such assignation, conveyance, or bequest taking effect, the security shall become moveable as regards the succession of such creditor or other person as the case may be, as provided by this act: And further, provided that all heritable securities shall continue,[5] and shall be heritable *quoad fiscum*,[6] and as regards all rights of courtesy[7] and terce[8] competent to the husband or wife of any such creditor, and that no heritable security, whether granted before or after marriage, shall to any extent pertain to the husband, *jure mariti*, where the same is or shall be conceived in favour of the wife,[9] or to the wife *jure relictae*,[10] where the same is or shall be conceived in favour of the husband, unless the husband or relict has or shall have right and interest therein otherwise;[11] declaring, nevertheless, that this provision shall in noway prejudice the rights and interests of wife or husband, or of the creditors of either, in or to the bygone interest and annual rents due under any such heritable security and *in bonis* of the husband or wife respectively prior to his or her death;[12] and further provided, that where legitim is claimed on the death of the creditor no heritable security shall to any extent be held to be part of the creditor's moveable estate in computing the amount of the legitim.[13]

Not to belong to Husband *jure mariti*, nor to Wife *jure relictæ*.

Nor to be computed in legitim.

[1] The Intestate Moveable Succession Act of 1855, as originally laid before Parliament, contained a clause providing that money invested on heritable security should be held to be moveable as to succession, but it was too general in its terms, and was ultimately dropped.

[2] *I.e.*, 31 December, 1868. See Brown *v.* Macdonald, 28 Jan. 1870, 8 M. 439; Boyd *v.* Cunninghame, 29 Nov. 1889, 17 R. 225.

[3] *I.e.*, as defined in sec. 3, subsec. 10, of the Act. The Conveyancing Act of 1874, 37 and 38 Vict. c. 94, § 30, extends this enactment to real burdens upon land except as regards succession. These still remain heritable as regards the succession of the creditor.

[4] *I.e.*, in the case of an intestate succession. Hare, 25 Nov. 1889, 17 R. 105. See *supra*, p. 178, note [6].

The statute, sec. 126, makes provision for the manner in which the executor is to make up his title to heritable securities. Such securities, although they pass to the executor and not to the heir, must, as regards constitution, transmission, and discharge, be dealt with according to the forms applicable to land rights. When a heritable security, however, devolves

upon an executor, he cannot complete his title by service, because that is competent only to an heir, nor can the heir make up a title by service, because, the subject being moveable, he has no right to it. See Hare, *supra*. Cf. *supra*, p. 175, note [9].

[5] Notwithstanding this enactment, the law remains as it was in certain respects.

(*a*.) All heritable securities falling within the scope of the Act are still heritable—

(1) *Quoad fiscum*;

(2) As regards (*a*) courtesy, (*b*) terce.

(*b*.) No heritable security, whether granted before or after marriage, shall to any extent pertain to—

(1) The husband *jure mariti* when the same is conceived in favour of the wife;

(2) The wife *jure relictae*, unless the husband or relict has or shall have right and interest therein otherwise.

(*c*.) This provision is not to prejudice the rights of wife or husband, or of the creditors of either, to arrears of interest *in bonis* after husband or wife prior to his or her death.

(*d*.) No heritable security is to any extent to be held part of the creditor's moveable estate in computing legitim.

[6] *Supra*, p. 175, note [10].

[7] *Supra*, §§ 47, 56, 97.

[8] *Supra*, §§ 48, 56, 97.

[9] *Supra*, §§ 56, 97. When the bond has not been originally taken in favour of the wife, but she succeeds to it, it becomes heritable in her person, and is not affected by the *jus mariti*. Hodge *v.* Hodge, 22 Nov. 1879, 7 R. 259.

[10] *Supra*, §§ 56, 97. Rossborough's Trustees *v.* Rossborough, 28 Nov. 1888, 16 R. 157.

[11] *I.e.*, by contract of marriage or otherwise. These words are repeated from 1661, c. 32. A security is not rendered moveable by the bondholder bringing the property to sale if he has not before his death granted a disposition. The widow is therefore not entitled to *jus relictae* from it, but she will have terce. Her husband's sasine at the date of his death is the measure of the widow's right. Rossborough's Trustees *v.* Rossborough, *supra*, note [9].

[12] Cf. 1661, c. 32 *supra*, p. 174. By the Apportionment Act, 1870, 33 and 34 Vict. c. 35, all periodical payments, in the nature of income, are to be considered as accruing from day to day, and are apportionable in respect of time accordingly.

[13] *Supra*, § 52.

The effect of this enactment is to enlarge the dead's part, subject only to the claims of courtesy or terce as the case may be.

SCHEDULE (DD).

Form of Minute excluding executors in an Heritable Security.

I, A.B. [here name and design the creditor], hereby exclude executors from the bond and disposition in security [or other security, here specify it by date, &c., and if recorded in register of sasines specify the

date of such recording, or if followed by an instrument so recorded specify the date of recording such instrument, and if the security has not been completed by infeftment, here say, the within bond and disposition in security (or assignation, or other deed or conveyance thereof, as the case may be)]. In witness whereof, &c. [insert testing clause in usual form].

SCHEDULE (EE).

Form of a Minute of Removal of the Exclusion of Executors in an Heritable Security.

I, A.B. [here name and design the creditor], hereby remove the exclusion of executors contained in [or endorsed on] the bond and disposition in security [or assignation, or otherwise, as the case may be, specifying the same as in schedule (DD), or contained in the minute of exclusion of executors (specify date of minute and of recording the same in the register of sasines)]. In witness whereof, &c. [insert a testing clause in usual form].

. . . . . .

§160. From and after the passing of this act no heir of line of a party deceased shall be entitled to claim in that character any portion of the moveable estate of such predecessor as heirship moveables, such claim being hereby abolished. Right to heirship moveables abolished.

[1] *Supra*, p. 43.

No. IX.

40 and 41 VICTORIA, c. 29.

An Act for the protection of the Property of Married Women in Scotland. [1]

[2*d August*, 1877.]

Whereas it is just and expedient to protect to the extent hereinafter provided for the property of married women in Scotland : [2]

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :

1. This Act shall commence and take effect from and after the first day of January one thousand eight hundred and seventy-eight. Commencement of Act.

2. This Act shall extend to Scotland only.[3] Extent of Act.

Protection of earnings of married women.

3. The jus mariti and right of administration of the husband shall be excluded from the wages[4] and earnings of any married woman, acquired or gained by her after the commencement of this Act, in any employment, occupation,[5] or trade in which she is engaged, or in any business which she carries on under her own name,[6] and shall also be excluded from any money or property acquired by her after the commencement of this Act through the exercise of any literary, artistic, or scientific skill, and such wages, earnings, money, or property, and all investments thereof, shall be deemed to be settled to her sole and separate use,[7] and her receipts shall be a good discharge for such wages, earnings, money, or property, and investments thereof.[8]

Liability of husband for wife's ante-nuptial debts limited to amount of property received through her.

4. In any marriage which takes place after the commencement of this Act, the liability of the husband for the ante-nuptial debts of his wife[9] shall be limited to the value of any property which he shall have received from, through, or in right of his wife at, or before, or subsequent to, the marriage, and any court in which a husband shall be sued for such debt shall have power to direct any inquiry or proceedings which it may think proper for the purpose of ascertaining the nature, amount, and value of such property.

Savings. 24 & 25 Vict. c. 86. 37 & 38 Vict. c. 31.

5. This Act shall not affect the rights conferred upon a married woman by the Conjugal Rights (Scotland) Amendment Act, 1861, or the Conjugal Rights (Scotland) Amendment Act, 1874.

Short title.

6. This Act may be cited as "The Married Women's Property (Scotland) Act, 1877."

[1] *Supra*, §§ 74, 75 *et seqq.*

[2] *Supra*, § 93.

[3] The corresponding English law at the time this statute was passed was contained in the Married Women's Property Act, 1870 (33 and 34 Vict. c. 93), and the Married Women's Property Act (1870), Amendment Act, 1874, (37 and 38 Vict. c. 50); repealed and new provisions substituted by the Married Women's Property Act, 1882, 45 and 46 Vict. c. 75. *Supra*, pp. 53, 78.

[4] Strictly "wages" applies only to the remuneration of domestic servants, artizans, labourers, and the like. Gordon *v.* Jennings, L. R. 9 Q. B. D. 45.

[5] *I.e.*, lawful occupation, *supra*, p. 48, note [2].

[6] *Supra*, § 76.

[7] *Supra*, p. 54, note [3], p. 82, and p. 186, note [4]. Therefore, if she remarries, the second husband's right of administration will be excluded, thus giving a larger protection than under the M. W. P. Act, 1881. See Buchanan *v.* Buchanan, 1890, 6 Sh. Co. Rep. 319.

[8] *Supra*, §§ 75, 76, 106; Moore *v.* Robinson, 48 L. J. 156.

[9] *Supra*, §§ 79, 80, 82, 105.

No. X.

43 and 44 VICTORIA, c. 26.

An Act to extend to Scotland the Facilities for effecting Policies of Assurance for the Benefit of Married Women and Children now in force in England and Ireland.[1]

[*26th August*, 1880.]

Whereas by the Married Women's Property Act, 1870,[2] increased facilities are given for effecting policies of assurance for the benefit of married women and children in England and Ireland: 33 & 34 Vict. c. 93.

And whereas it is expedient that such increased facilities for effecting policies of assurance for the benefit of married women and children should be extended to Scotland:

Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Married woman may effect policy of assurance for her separate use.

1. A married woman may effect a policy of assurance, on her own life or on the life of her husband, for her separate use[3] and the same and all benefit thereof, if expressed to be for her separate use, shall, immediately on being so effected, vest in her, and shall be payable to her, and her heirs, executors, and assignees, excluding the jus mariti and right of administration of her husband,[4] and shall be assignable by her either *inter vivos* or *mortis causa* without consent of her husband;[5] and the contract in such policy shall be as valid and effectual as if made with an unmarried woman.

Policy of assurance may be effected in trust for wife and children.

2. A policy of assurance effected by any married man[6] on his own life, and expressed upon the face of it to be for the benefit of his wife or of his children, or of his wife and children,[7] shall, together with all benefit thereof, be deemed a trust for the benefit of his wife for her separate use,[8] or for the benefit of his children, or for the benefit of his wife and children; and such policy, immediately on its being so effected, shall vest in him and his legal representatives in trust for the purpose or purposes so expressed, or in any trustee[9] nominated in the policy, or appointed by separate writing duly intimated to the assurance office,[10] but in trust always as aforesaid, and shall not otherwise be subject to his control, or form part of his estate,[11] or be liable to the diligence of his creditors, or be revocable as a donation,[12] or reducible on any ground of excess or insolvency:[13] And the receipt of such trustee for the sums secured by the policy, or for the value thereof, in whole

or in part, shall be a sufficient and effectual discharge to the assurance office :[14] Provided always, that if it shall be proved that the policy was effected and premiums thereon[15] paid with intent to defraud creditors, or if the person upon whose life the policy is effected shall be made bankrupt within two years from the date of such policy, it shall be competent to the creditors to claim repayment of the premiums so paid from the trustee of the policy out of the proceeds thereof.[16]

Application and short title of Act.

3. This Act shall apply only to Scotland, and may be cited as the Married Women's Policies of Assurance (Scotland) Act, 1880.

[1] *Supra*, § 83.

[2] Repealed by the Married Women's Property Act, 1882, which (sec. 11) re-enacted the same provisions with some modification.

[3] *Supra*, §§ 83, 86, and p. 186, note [4], p. 194, note [7].

"Such separate use will operate not merely during the interval between the husband's death and the time when she receives the money, but at any subsequent time if she marries again, and the capital fund or any part of it remains undisposed of." Per North J. in *Re* Seyton, L. R. 34 Ch. D. 516.

Such property therefore will have a larger protection than under the M. W. P. Act, 1881. It will be independent of the husband's right of administration as well as of his *jus mariti*.

See the Conjugal Rights Amendment Act, 1861, § 6 (*supra*, p. 52), as to property acquired by a married woman during the subsistence of a Protection Order, if such order drops.

[4] *Supra*, §§ 100, 106, and p. 186, note [4].

[5] The necessary result of the exclusion of the right of administration. It is not excluded under the Act of 1880, so that the husband's consent is necessary as regards property protected by that Act.

[6] *Supra*, §§ 84, 85.

[7] *Supra*, § 86.

[8] The reference to the wife's separate use does not prevent her taking a share of capital. A policy narrated that A. B. was desirous of assuring his life under the provisions of the corresponding English enactment (33 and 34 Vict. c. 93, § 10) for the benefit of his wife, C. B., and of the children of the marriage, and certified that under the provisions of the Act the said C. B. and the children of the marriage, whom failing the heirs, administrators, or assigns of the said A. B., should be entitled to receive a certain sum at the end of six months after the decease of A. B. A. B. died 1st April, 1886, survived by his wife and five children. There were seven children of the marriage; one had died before the policy was effected, another died an infant in the lifetime of A. B., a third died shortly after A. B. under age. Held that the child who died after the father might be disregarded, and that the widow and four remaining children took as joint tenants and not as in a case of intestacy. *Re* Seyton, L. R. 34 Ch. D. 511; explaining *In re* Mellor's Policy Trusts, L. R. 7 Ch. D. 200; and dissenting from *Re* Adam's Policy Trusts, L. R. 23 Ch. D. 525.

[9] The appointment of trustees is not a necessity. The Act "merely provides machinery by which the Assurance Company may get a valid discharge, without having to see to the execution of the trust." Per North, J. in *Re* Seyton, L. R. 34 Ch. D. 516.

The English Act made special provision for the appointment of trustees by the Court, in case of need. In Scotland the matter rests upon the common law and the Trusts (Scotland) Act, 1867 (30 and 31 Vict. c. 97, § 11).

Pearson, J. in *Re* Howson's Policy Trusts, W. N. 1885, p. 213, declined to appoint a sole trustee where infants were concerned. In Schultze *v.* Schultze, 82 *L. T. Journal*, 301, 315, it was held that although the Act provided only for the appointment of one trustee the Court had power under its general jurisdiction to appoint more, and two were appointed. The M. W. P. Act, 1882, now gives (sec. 11) the Court express power to appoint more than one trustee.

[10] A policy in terms of the Act is not liable to stamp duty as a "settlement."

[11] *Supra*, §§ 87, 193.

[12] *Supra*, §§ 86, 87, 193, 197.

[13] *Supra*, §§ 193, 197.

[14] *Supra*, § 84.

[15] If a man having an ordinary policy on his own life, such policy being then of no substantial value, surrenders it, and takes in substitution a policy under the Act for the benefit of his wife, it will be protected, although the latter may have some incidental advantage through the surrender, *e.g.*, antedating the time from which it should be entitled to participate in premiums. Holt *v.* Everall, L. R. 2 Ch. D. 266. If the policy surrendered was of substantial value, and was accepted as part payment of the premium on the new policy, the creditors of the husband have their rights under this part of the section. *Ib.*

[16] *Supra*, § 193.

No. XI.

44 and 45 Victoria, c. 21.

An Act for the Amendment of the Law regarding Property of Married Women in Scotland.[1]

[18*th July*, 1881.]

Whereas an Act was passed in the fortieth year of the reign of Her present Majesty, entitled the Married Women's Property (Scotland) Act,[2] and it is just and expedient to protect, to the further extent hereinafter provided for, the property of married women in Scotland : 40 & 41 Vict. c. 29.

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :

Wife married after date of Act to have separate estate in moveables.

1. (1.) Where a marriage is contracted after the passing of this Act, and the husband shall, at the time of the marriage, have his domicile in Scotland,[3] the whole moveable or personal estate of the wife, whether

acquired before or during the marriage, shall, by operation of law, be vested[4] in the wife as her separate estate,[5] and shall not be subject to the jus mariti.[6]

[1] *Supra*, § 88 *et seqq.*

[2] *Supra*, p. 193.

[3] *Supra*, §§ 89, 93.

[4] "Vested," cf. "vest," M. W. Policies of Assurance Act, §§ 1 and 2.

[5] This does not exclude the wider protection afforded by marriage contract (subsec. 5 and sec. 8). The Act only makes that to be separate estate which is not so otherwise by contract or destination. *Re* Storror, 24 L. R. Ch. D. 195; *Re* Whitaker L. R. 34 Ch. D. 227; 31 *Solicitors' Jl.* p. 376.

Income.

(2.) Any income of such estate shall be payable to the wife on her individual receipt or to her order, and to this extent the husband's right of administration shall be excluded; but the wife shall not be entitled to assign the prospective income thereof, or, unless with the husband's consent, to dispose of such estate.[6]

Liability to arrestment.

(3.) Except as hereinafter provided, the wife's moveable estate shall not be subject to arrestment, or other diligence of the law, for the husband's debts,[7] provided that the said estate (except such corporeal moveables as are usually possessed without a written or documentary title)[8] is invested, placed, or secured in the name of the wife herself, or in such terms as shall clearly distinguish the same from the estate of the husband.[9]

Bankruptcy.

(4.) Any money, or other estate of the wife, lent or entrusted to the husband, or immixed with his funds, shall be treated as assets of the husband's estate in bankruptcy, under reservation of the wife's claim to a dividend as a creditor for the value of such money or other estate after but not before the claims of the other creditors of the husband for valuable consideration[10] in money or money's worth have been satisfied.

Contracts of marriage.

(5.) Nothing herein contained shall exclude or abridge the power of settlement by ante-nuptial contract of marriage.[11]

[6] *Supra*, §§ 89, 90. In England the word "dispose" is sometimes used as meaning an *inter vivos* as distinguished from a *mortis causa* deed. Here it is evidently used not in any technical or narrow or limiting sense, but as meaning disposition in any way and by any Act or deed and for or without consideration. Cf. The Conjugal Rights Amendment Act, § 6, *supra*, p. 185. Astley *v.* Manchester etc. Ry. Co. 2 De. G. and J. 453, a case upon the use of the word in the Lands Clauses Act. See also the Thellusson Act, § 1, *infra*, p. 202, note [2].

At common law a wife is entitled to make a testament or a will, and her husband's consent is not necessary to validate it. Ersk. 1. 6. 28; Miller *v.* Milne's Trustee, 3 Feb. 1859, 21 D. 377; Fraser, *Husband and Wife*, i. p. 564. Cf. 18 Vict. c. 23, § 6, *supra*, p. 181. According to

Regiam Majestatem a woman *vestita viro* could not make a testament without her husband's consent, ii. c. 29, ed. Innes, c. 36 (ed. Skene).

[7] *Supra*, § 92.

[8] *Supra*, §§ 92, 222. As to what is included under the term "corporeal moveables" see Fraser, *Husband and Wife*, p. 690.

[9] *Supra*, § 175.

[10] *I.e.*, real as distinguished from nominal or elusory consideration. Cf. *supra*, p. 18; and 1620, c. 18, *supra*, p. 138.

[11] *Supra*, § 230. The Act is not to prevent any such settlement being made as could have been made before it was passed. The power of settlement by post-nuptial contract is reserved by sec. 8.

Rents of heritable property to be separate estate in wife.

2. Where a marriage is contracted after the passing of this Act the rents and produce of heritable property in Scotland belonging to the wife shall no longer be subject to the jus mariti and right of administration of the husband.[1]

[1] *Supra*, § 89.

How far Act to apply to marriages contracted before its passing.

3. In the case of marriages which have taken place before the passing of this Act:

(1.) The provisions of this Act shall not apply where the husband shall have, before the passing thereof, by irrevocable deed or deeds, made a reasonable provision for his wife in the event of her surviving him:[1]

(2.) In other cases the provisions of this Act shall not apply except that the jus mariti and right of administration shall be excluded to the extent respectively prescribed by the preceding sections from all estate, moveable or heritable, and income thereof, to which the wife may acquire right after the passing of the Act.[2]

[1] *Supra*, § 94.

[2] *Supra*, § 94. Nothing is said here as to vesting in the wife.

In case of marriages contracted before Act parties may come under its provisions by deed.

4. It shall be competent to all persons married before the passing of this Act to declare by mutual deed[1] that the wife's whole estate, including such as may have previously come to the husband in right of his wife, shall be regulated by this Act, and upon such deed being registered in the register of deeds at Edinburgh or in the Sheriff Court register of the county or counties in which the parties reside, and being advertised in terms of the schedule in the *Edinburgh Gazette* and three times in two local newspapers circulating in such county or counties, the said estate shall be vested in her as herein-before provided, and subject to the provisions of this Act; provided that the said estate (except such corporeal moveables as are usually possessed without a

written or documentary title) is invested, placed, or secured, in the name of the wife herself, or in such terms as shall clearly distinguish the same from the estate of the husband; but no such deed shall be of any effect as against any debt or obligation contracted by the husband prior to the date of the deed being so advertised and registered.

[1] *Supra*, §§ 95, 194.

Husband's consent dispensed with in certain cases.

5. Where a wife is deserted by her husband,[1] or is living apart from him with his consent, a judge of the Court of Session or Sheriff Court, on petition addressed to the court, may dispense with the husband's consent[2] to any deed relating to her estate.[3]

[1] Cf. the Conjugal Rights (Scotland) Amendment Act, 1861, § 1, *supra*, p. 183.

[2] *Supra*, §§ 100, 106.

[3] Or to a petition for her appointment as executor-dative. Currie, *The Confirmation of Executors*, p. 98 (ed. 1890).

Right given to husband in wife's moveable succession.

6. After the passing of this Act the husband of any woman who may die domiciled in Scotland[1] shall take by operation of law the same share and interest in her moveable estate which is taken by a widow in her deceased husband's moveable estate, according to the law and practice of Scotland,[2] and subject always to the same rules of law in relation to the nature and amount of such share and interest, and the exclusion, discharge, or satisfaction thereof, as the case may be.[3]

[1] This is in accordance with the common law rule. Nisbett *v.* Nisbett's Trustees, 24 Feb. 1835, 13 S. 517; Newlands *v.* Chalmers' Trustees, 22 Nov. 1832, 11 S. 65; *supra*, § 39.

[2] *Supra*, §§ 96, 97, 98.

[3] Since the passing of this Act the husband has been decerned executor *qua* husband in the same manner as the widow has been in use to be decerned *qua* relict, Currie, *The Confirmation of Executors*, pp. 86, 293 (ed. 1890); but in a competition for the office the husband will be postponed to the next of kin, seeing that at common law they are entitled to the office in preference to the relict. Stewart *v.* Kerr, 19 March, 1890, 17 R.

Children of women dying domiciled in Scotland to have right of legitim, &c.

7. [1]After the passing of this Act the children of any woman who may die domiciled in Scotland shall have the same right of legitim in regard to her moveable estate which they have according to the law and practice of Scotland in regard to the moveable estate of their deceased father,[2] subject always to the same rules of law in relation to the character and extent of the said right, and to the exclusion, discharge, or satisfaction thereof, as the case may be.

[1] *Supra*, § 99.

[2] This excludes heritable securities upon or affecting land within the meaning of the Titles to Land Consolidation Act, 1868, *supra*, p. 190.

8. This Act shall not affect any contracts made or to be made between married persons before or during marriage, or the law relating to such contracts,[1] or the law relating to donations between married persons,[2] or to a wife's non-liability to diligence against her person, or any of the rights of married women under the recited Act.[3] Exempting contracts and certain legal rights from operation of Act.

[1] *Supra*, §§ 95, 102, 174. Cf. Act 1681, c. 10, *supra*, p. 177, note [2].
The present Act is not to affect any marriage or contract, ante-nuptial or post-nuptial (the power to make the former being reserved by sec. 1 sub-sec. 5), or the rights of parties thereunder. The wife's estate may, notwithstanding sec. 1, be put *sub jure mariti*: the enactments as to *jus relicti* and legitim may be renounced or varied, and so on. *Re* Storror's Trust, L. R. 24 Ch. D. 195; *Re* Whitaker, L. R. 34 Ch. D. 227. But neither ante-nuptial nor post-nuptial contracts are to have more extensive privileges than before. The result of the English Act is that settled property may be exposed to liabilities it was not subject to before. *Re* Armstrong, L. R. 21 Q. B. D. 264. Cf. 31 and 32 Vict. c. 101, § 117, as to heritable securities, *supra*, p. 192, note [11].

[2] *Supra*, §§ 14, 177.

[3] *Supra*, § 102.

9. This Act may be cited as the Married Women's Property (Scotland) Act, 1881. Short title.

SCHEDULE.

Form of Notice prescribed by Section 4.[1]

Notice is hereby given that on the day of a deed by *A.B.* of *C.* [*designation*] and *E.F.* his wife has been registered in the Register of in terms of the Married Women's Property (Scotland) Act, 1881.

[1] *Supra*, § 95, note [2].

No. XII.

39 AND 40 GEO. III., c. 98.

An Act to restrain all Trusts and Directions in Deeds or Wills, whereby the Profits or Produce of Real or Personal Estate shall be accumulated, and the beneficial enjoyment thereof postponed beyond the time therein limited. [1]

[*28th July*, 1800.]

WHEREAS, it is expedient that all dispositions[2] of real or personal estates, whereby the profits and produce thereof are directed to be accumulated, and the beneficial enjoyment thereof is postponed, should be made subject to the restrictions hereinafter contained. May it therefore please your Majesty that it may be enacted, and be it enacted by the King's most excellent Majesty by and with the advice Preamble. No person by deed or will, &c., shall

settle or dispose of any real or personal property in such manner that the rents or produce shall be accumulated for a longer period than herein mentioned, and any other direction shall be void, and the rents, &c., shall go to the persons who would otherwise be entitled thereto.

and consent of the Lords, spiritual and temporal, and Commons, in Parliament assembled, and by the authority of the same, that no person or persons[3] shall, after the passing of this Act, by any deed or deeds, surrender or surrenders, will, codicil or otherwise howsoever, settle or dispose of any real or personal property so and in such manner that the rents, issues, profits, or produce thereof shall be wholly or partially accumulated for any longer term[4] than the life or lives of any such grantor or grantors, settlor or settlors, or the term of twenty-one years from the death of any such grantor,[5] settlor, devisor, or testator, or during the minority or respective minorities of any person or persons who shall be living or in *ventre sa mere* at the time of the death of such grantor, devisor, or testator, or during the minority or respective minorities only of any person or persons who, under the uses or trusts of the deed, surrender, will, or other assurances directing such accumulations would, for the time being, if of full age, be entitled unto the rents, issues, and profits, or the interest, dividends, or annual produce so directed to be accumulated; and in every case where any accumulation shall be directed otherwise than as aforesaid,[6] such direction[7] shall be null and void,[8] and the rents, issues, profits and produce of such property so directed to be accumulated shall, so long as the same shall be directed to be accumulated contrary to the provisions of this Act,[9] go to and be received by such person or persons as would have been entitled thereto, if such accumulation had not been directed.[10]

[1] Commonly called the Thellusson Act. The principal points which have arisen under the Act are discussed in the *Law Times*, Vol. lxiv. p. 457; Vol. lxv. p. 31, *et seqq.* See also, Jarman, *Treatise on Wills*, i. p. 302, *et seqq.* (4th ed., 1881); M'Laren, *Wills and Succession*, i. p. 302, *et seqq.*; Bythewood and Jarman, *Precedents in Conveyancing*, vii. p. 448 (ed. 1889); Hargrave, *Treatise on the Thellusson Act* (London, 1842).

[2] The word "dispositions" is a general term covering the particular deeds specified in the enacting clause. Per Lord Deas in Keith's Trustees *v.* Keith, 17 July, 1857, 19 D. at p. 1069.

[3] This does not cover a beneficiary under a settlement. Accumulation by a beneficiary is not struck at. Griffiths *v.* Vere, 9 Ves. 127, 136; Tench *v.* Cheese, 6 De. G. M. and G. 453.

It is different in the case of trustees on whom the deed imposes the duty of accumulation. Pursell *v.* Elder, 1865, 4 M'Q. 992; Lord *v.* Colvin, 7 Dec. 1860, 23 D. 111.

[4] *Supra*, § 152.

The four different periods beyond which accumulation of income is unlawful are alternative not cumulative. Therefore when one period has been applied and exhausted, a second period cannot be resorted to and applied in order to extend the time for accumulation. None of the periods exceed twenty-one years from the death of the settlor. Jagger *v.* Jagger, L. R. 25 Ch. D. 729.

[5] Excluding the day of the testator's death. Lord *v.* Colvin, 7 Dec. 1860, 23 D. 111; Gorst *v.* Lowndes, 11 Sim. 434; Lester *v.* Garland, 15 Ves. 248.

[6] A direction in a will to apply a sufficient part of the income of the testator's estate in keeping on foot policies effected by him on the lives of his children, and to be settled in case of their marriage on their wives and children, is not a trust for accumulation within the statute, and is accordingly effectual for a period of more than twenty-one years from the testator's death. Bassil *v.* Lister, 9 Hare, 177. The effecting of policies of insurance on lives is not a mode of accumulation at all. Cathcart's Trustees *v.* Heneage's Trustees, 13 July, 1883, 10 R. 1205.

But after the lapse of twenty-one years from the testator's death trustees are not entitled to apply surplus revenue in paying off debts incurred by themselves in the purchase of lands during that period. Such payments are accumulations. Smyth's Trustees *v.* Kinloch, 20 July, 1880, 7 R. 1176.

[7] It is immaterial that the settlor has not directed accumulation, if the effect of the deed is to cause accumulation beyond the limits allowed by the statute. Lord *v.* Colvin, 7 Dec. 1860, 23 D. 111; and the English cases of Evans *v.* Hellier, 12 Cl. and F. 114; Tench *v.* Cheese, 6 De. G. M. and G. 453; Countess of Bective *v.* Hodgson, 10 H. L. Ca. 656, 671; Mathews *v.* Keble, L. R. 3 Ch. App. 691; Wade-Gery *v.* Handley, L. R. 1 Ch. D. 653, 3 Ch. D. 374; Campbell's Trustees *v.* Crichton, 1890, per Lord Kincairney, but now under review in Inner House.

[8] A trust for accumulation, reaching beyond the allowed period, is good *pro tanto*. Luydon *v.* Simson, 12 Ves. 295.

[9] *I.e.*, from the commencement of the twenty-second year. Per M'Neill, L.P., in Keith *v.* Keith's Trustees, 17 July, 1857, 19 D. at p. 1057.

[10] The effect is to give the accumulations to the persons who would have succeeded *ab intestato*; that is to the persons entitled to take by reason of the deceased not having disposed of that estate. This implies a reference to the date at which he died intestate. Lord *v.* Colvin, 7 Dec. 1860, 23 D. 111; Smyth's Trustees *v.* Kinloch, 20 July, 1880, 7 R. 1176.

As to the destination of income released from accumulation, see M'Laren, *Wills and Succession*, i. p. 307; Bythewood and Jarman, *Precedents*, vii. p. 452; Ogilvie *v.* Kirk Session of Dundee, 18 (decided 12) July, 1846, 8 D. 1229; Lord *v.* Colvin, *supra*; Mackenzie *v.* Mackenzie's Trustees, 29 June, 1877, 4 R. 962; Maxwell's Trustees *v.* Maxwell, 24 Nov. 1877, 5 R. 248; Smyth's Trustees *v.* Kinloch, *supra*.

Nothing herein to extend to any provision for payment of debts or for raising portions for children or touching the produce of timber; nor to any disposition of heritable property in Scotland.

2. Provided always, and be it enacted, that nothing in this Act contained shall extend to any provision for payment of debts of any grantor, settlor, or devisor, or other person or persons,[1] or to any provision for raising portions[2] for any child or children of any grantor, settlor, or devisor, or any child or children of any person taking any interest under any such conveyance, settlement or devise, or to any direction touching the produce of timber or wood upon any lands or tenements, but that all such provisions and directions shall and may be made and given as if this Act had not passed.

3. Provided also, and be it enacted, that nothing in the Act contained shall extend to any disposition respecting heritable property within that part of Great Britain called Scotland.[3]

When restrictions shall take effect

4. Provided also, and be it enacted, that the restrictions in this Act contained shall take effect and be in force with respect to wills and

with respect to wills made before the passing of this Act.

testaments made and executed before the passing of this Act in such cases only where the devisor or testator shall be living, and of sound and disposing mind after the expiration of twelve calendar months from the passing of this Act.[4]

[1] They must be debts in existence at the death of the settlor and subsisting at the date when the trust comes into operation, not debts incurred by the trustees under the settlement. Smyth's Trustees *v.* Kinloch, 20 July, 1880, 7 R. 1176. To come within the exception it must be the primary and *bona fide* object of the testator's direction to make provision for payment of the debts. Mathews *v.* Keble, L. R. 3 Ch. App. 691. Accumulation will not be allowed if in point of fact the debts are paid off from other sources. Tewart *v.* Lawson, L. R. 18 Eq. 490.

[2] As to this part of the Act, see Peachey, *The Law of Settlements*, p. 440 *et seqq*; Bythewood and Jarman, *Precedents*, vii. p. 456; Barrington *v.* Liddell, 2 De. G. M. and G. 480.

[3] Repealed 11 and 12 Vict. c. 36, s. 41, *infra*, p. 205, which enacts that 39 and 40 Geo. III. c. 98, shall in future apply to heritable property in Scotland.

The Act applied to moveable property in Scotland from the date of its passing. *Supra*, § 153. Ogilvie's Trustees *v.* Kirk Session of Dundee, 18 July, 1846, 8 D. 1230. Keith's Trustees *v.* Keith, 17 July, 1857, 19 D. 1040; M'Laren, *Wills and Succession*, i. p. 300.

"The reason for the exception of heritable property was to avoid trenching on the prejudices of the Scotch people, and out of a regard to the law of perpetuities in that country." Per Kindersley, V.C., in Macpherson *v.* Stewart, 1858, 7 W. R. 34.

[4] Commented on by Lord Ivory and Lord Deas in Keith's Trustees *v.* Keith, *supra*, 19 D. at pp. 1062, 1069.

No. XIII.

11 AND 12 VICTORIA, C. 36.

An Act for the Amendment of the Law of Entail in Scotland.[1]

[14*th August*, 1848.]

[1] Commonly called the Rutherfurd Act. *Supra*, §§ 145, 148.

In the year 1764, upon the suggestion of Lord Mansfield, proposals were made by the Faculty of Advocates for the abolition of the law of Entail. At a meeting of the Faculty upon 4th August, 1764, the proposals were approved of by 43 to 4. In 1765 was published, "*Heads for a Bill to amend the law concerning Taillies in that part of Great Britain called Scotland. By the Faculty of Advocates. Edinburgh*, 1765," 8*vo*. The scheme was to allow existing entails to stand as they were during the lives of the heirs in possession and of the substitutes then alive, and that thereafter the prohibitions of the entail should become inoperative except to the extent to be allowed by the proposed Act. It was proposed that in future it should not be lawful to restrain any heirs of taillie not in life at the time from alienating such lands for valuable consideration, or from granting heritable securities thereon; but that it should be lawful for proprietors to make entails binding upon persons in life at the time of making the settlement.

The proposals were supported by Lord Swinton, then at the Bar (*A free Disquisition concerning the law of Entails in Scotland, Edinburgh*, 1765, 8vo.); and were opposed by Sir John Dalrymple of Cranstoun (*Considerations upon the Policy of Entails in Great Britain, Edinburgh*, 1764, 8vo.), and by Patrick, fifth Lord Elibank (*Queries relating to the proposed Plan for altering Entails in Scotland in a Letter to ———, Edinburgh*, 1765, 8vo). The latter was, however, willing to have it enacted that no entail should be binding beyond the extent of £15,000 Scots per annum valued rent, and that the excess should be dealt with as not entailed; and that no estate under £500 valued rent should be capable of being entailed. In 1765 there was published *Proposals for amending the law concerning Tailzies in Scotland, Edinburgh*, 1765, 8vo. This is a draft Bill upon the lines suggested by Lord Elibank. These proposals were criticized in *A letter from a Gentleman in Edinburgh to his friend in the country containing an answer to the Proposals for amending the law concerning Tailzies in Scotland, Edinburgh*, 1765, 8vo. This letter approved generally of the Proposals, but the writer did not think that they went far enough.

The sweeping changes suggested by the Faculty of Advocates were far in advance of the time, and came to nothing, but in 1770 James Montgomery as Lord Advocate brought in a Bill which became law as 10 Geo. III. c. 51. This Act gave effect to many of the minor changes which had been advocated; it authorized agricultural and building leases and excambions, and provided for compensation for improvements; but did nothing towards putting an end to entails or to perpetuities of any kind.

So inflexible was the law established by the Act of 1685 that, as stated by Lord Advocate Rutherfurd in introducing the Bill, which afterwards became the Act of 1848, it was competent for the settlor "to render it impossible, on the part of any future holder, to alter so much as the arms upon his carriage, or the button upon his servant's livery, even though it should be for a period of five hundred years."

. . . . .

39 & 40 Geo. III. applied to heritable property in Scotland.

41. And whereas an Act was passed in the thirty-ninth and fortieth years of the reign of His Majesty, King George the Third, intituled "An Act to restrain all Trusts and Directions in Deeds or Wills, whereby the Profits or Produce of Real or Personal Estate shall be accumulated, and the beneficial enjoyment thereof postponed beyond the Time therein limited,"[1] by which Act it is provided and enacted, "that nothing in this Act contained shall extend to any disposition respecting heritable property within that part of Great Britain called Scotland;" and it is expedient that the provisions of the said Act should be extended to heritable property in Scotland; be it enacted, that the said provision and enactment of the said recited Act shall be, and the same is hereby repealed, and the said Act shall in future apply to heritable property in Scotland.[2]

. . . . .

[1] *Supra*, p. 201.

[2] *Supra*, § 153. Directions in deeds, which became operative prior to 14th August, 1848, for accumulating the rents, profits, and issues of heritable property in Scotland, are not affected by anything contained in the Thellusson Act or in the Rutherfurd Act, but remain in the same full force which they possessed when such deeds first came into operation. See *Interlocutor* in Keith's Trustees *v.* Keith, 17 July, 1857, 19 D. at p. 1071; Per

Lord Westbury, L.C., in Pursell *v.* Elder, 1865, 4 M'Q. 992, s.c. 2 Paterson, App. Ca. 1303; M'Larty's Trustees *v.* M'Laverty, 23 Jan. 1864, 2 M. 489; Cathcart's Trustees *v.* Heneage's Trustees, 13 July, 1883, 10 R. 1205.

Act not to be defeated by trusts.

47. And be it enacted that where any land or estate in Scotland shall, by virtue of any trust disposition or settlement or other deed of trust whatsoever,[1] dated[2] on or after the first day of August, one thousand eight hundred and forty-eight, be in the lawful possession, either directly or through any trustees for his behoof, of a party of full age, born after the date[3] of such trust disposition settlement or other deed of trust, such party shall not be in any way affected by any prohibitions, conditions, restrictions, or limitations, which may be contained in such trust disposition or settlement or other deed of trust, or by which the same or the interest of such party therein may bear to be qualified, such prohibitions, conditions, restrictions, or limitations, being of the nature of prohibitions, conditions, restrictions, or limitations of entail, or intended to regulate the succession of such party, or to limit, restrict, or abridge his possession or enjoyment of such land or estate in favour of any future heir, and such party shall be deemed and taken to be the fee-simple proprietor of such land or estate, and it shall be lawful to such party to make application by way of summary petition to the Court of Session, setting forth the facts, and referring to this Act, and craving the Court to pronounce an act and decree declaring him fee-simple proprietor of such land or estate, and unaffected by any such conditions, provisions, restrictions, or limitations; and the Court shall proceed in such petition as may be just, and shall have power to pronounce an act and decree declaring such party to be fee-simple proprietor of such land or estate, and unaffected as aforesaid; and such act and decree may be recorded in the register of sasines, and being so recorded, shall have all the operation and effect of the most formal and valid disposition to such party, and his heirs and assignees whomsoever, of such lands or estate, with infeftment thereon in favour of such party duly recorded: Provided always that the rights of the superior of such lands or estate, and of all parties holding securities thereon, and all rights which are held independently of such trust disposition or settlement, or other deed of trust, shall be as they are hereby reserved entire.

[1] These words cover *mortis causa* as well as *inter vivos* deeds.

[2] *I.e.*, bearing date, *supra*, § 148.

[3] Cf. sec. 1 of the Act, as to a consenter born "after the date of the tailzie."

Or by life-ronts.

48. And be it enacted, that from and after the passing of this Act it shall be competent to grant an estate in Scotland limited to a liferent interest in favour only of a party in life at the date of such grant;

and where any land or estate in Scotland shall, by virtue of any deed dated on or after the said first day of August one thousand eight hundred and forty-eight, be held in liferent by a party of full age, born after the date of such deed, such party shall not be in any way affected by any prohibitions, conditions, restrictions, or limitations which may be contained in such deed, or by which the same or the interest of such party therein may bear to be qualified, and such party shall be deemed and taken to be the fee-simple proprietor of such estate, and it shall be lawful to such party to obtain and record an act and decree of the Court of Session in the like form and manner and in the like terms and with the like operation and effect as is hereinbefore provided with reference to an act and decree of the said Court in the case of deeds of trust: Provided always that the rights of the superior of such lands or estate and of all parties holding securities thereon, and all rights which shall be held independently of the deed by which such liferent is constituted, shall be as they are hereby reserved entire.

Or by leases.

49. And be it enacted, that where any land or estate in Scotland shall, by virtue of any tack, assignation of tack, or other deed or writing, dated on or after the said first day of August, one thousand eight hundred and forty-eight, be held in lease, either directly or through trustees for his behoof, by a party of full age born after the date of such tack, assignation of tack, or other deed or writing, such party shall not be in any way affected by any prohibitions, conditions, restrictions, or limitations, which may be contained in such tack, assignation of tack, or other deed or writing, or by which the same or the interest of such party therein may be qualified, such prohibitions, conditions, restrictions, or limitations, being of the nature of prohibitions, conditions, restrictions, or limitations of entail, or intended to regulate the succession of such party, or to limit, restrict, or abridge his possession or enjoyment of such land or estate in favour of any future heir: Provided always that it shall be lawful to the proprietor of whom such lease is held to enforce any prohibitions, conditions, restrictions, or limitations contained in such tack, assignation of tack, or other deed or writing which shall have been inserted therein for the *bona fide* purpose of protecting the just rights and interests of such proprietor, in so far as such enforcement may be necessary in order to such protection.

. . . . .

Interpretation of Act.

52. And be it enacted, that in construing this Act, except where the nature of the provision shall be repugnant to such construction, ... the words "land" and "lands" shall extend to and comprehend all heritages. . . . .

No. XIV.

31 AND 32 VICTORIA, c. 84.

An Act to amend in several particulars the Law of Entail in Scotland.[1]

[31*st July*, 1868.]

. . . . .

Liferents of personal estate beyond certain limits prohibited.

17. From and after the passing of this Act, it shall be competent to constitute or reserve, by means of a trust or otherwise, a liferent interest in moveable and personal estate in Scotland in favour only of a party in life at the date of the deed constituting or reserving such liferent, and where any moveable or personal estate in Scotland shall, by virtue of any deed dated after the passing of this Act (and the date of any testamentary or *mortis causa* deed shall be taken to be date of the death of the grantor, and the date of any contract of marriage shall be taken to be the date of the dissolution of the marriage), be held in liferent by or for behoof of a party of full age, born after the date of such deed, such moveable or personal estate shall belong absolutely to such party, and where such estate stands invested in the name of any trustees such trustees shall be bound to deliver, make over, or convey such estate to such party: Provided always, that where more persons than one are interested in the moveable or personal estate held by trustees as hereinbefore mentioned, all the expenses connected with the transference of a portion of such estate to any of the beneficiaries in terms of this Act shall be borne by the beneficiary in whose favour the transference is made.

[1] *Supra*, § 146.

[2] *Supra*, p. 99.

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